In the Supreme Court

OF THE

United States

OCTOBER TERM, 1926

No. 140

ISABELLE BARBIERE,

Appellant,

vs.

WELLS FARGO NEVADA NATIONAL BANK OF SAN FRANCISCO, ROSE G. NOYES, individually, and ROSE G. NOYES, as executrix, &c.,

Respondents.

APPELLANT'S OPENING BRIEF.

WM. H. CHAPMAN,

Attorney for Appellant.

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STATEMENT OF THE CASE.

This case comes before this court upon an appeal from the decision of the United States Circuit Court of Appeals, for the Ninth Circuit, reversing the decree of the District Court with directions to dismiss the bill. (298 Fed. 689.)

The case was pending in the Court of Appeals upon an appeal taken by the defendants, respondents in this court, from a final decree entered Aug. 23, 1923

(Tr. p. 405) in favor of the complainant, appellant here (see opinion trial court, Dietrich, J., 277 Fed. 110) and upon a cross-appeal taken by appellant from the decree of the District Court in so far as it denied her the full measure of the relief asked. In the Court of Appeals no notice whatever was taken of the cross-appeal but, as stated, the decree to the extent that it was in favor of appellant, was reversed and the bill dismissed.

The case is one which peculiarly requires a very accurate and chronological statement of the facts, which should be divided into two parts:

1. The facts found by the trial court (277 Fed. 110) which gave rise to this litigation, resulting in a judgment for complainant to the extent granted; and

2. A statement detailing the proceedings in the trial court leading up to the entry of the decree there, *showing the progress of the litigation in that court.*

This latter branch of the discussion is likely to prove more enlightening to the court than even the former branch. The facts of the case are very unusual and may be briefly stated as follows:

1. Isabelle Barnette, the wife of Captain Barnette, was the first white woman to tread the shores of Fairbanks, in Alaska—Isabelle Pass being named after her. She was the mother of two children, girls of very tender age at the time of the happenings here in question. Her husband, Captain Barnette, had been president of the Washington-Alaska Bank, which failed in January of 1911. At that time she

was living in Los Angeles with her children and her husband had just returned from Seattle. She was then convalescing from a severe operation caused by the birth of the youngest child. Mr. Barnette insisted upon going to Alaska to look after the bank crisis, and she begged him not to go until she was in a condition to accompany him. After the lapse of about a week or ten days an anonymous letter arrived stating that unless Captain Barnette proceeded to Alaska immediately and adjusted the bank affairs, he would meet with violence at the hands of the depositors. The Captain thereupon left for Seattle and Mrs. Barnette shortly afterwards joined him there and insisted upon accompanying him to Fairbanks. They left Seattle in a blinding snowstorm and on the second day were shipwrecked on the rocks off Cape Hinchenbrook. After being rescued by another ship they were taken to Cordova and on the next day, through another severe snowstorm and blockade, went by rail from Cordova to Chipina. The trip was a hard one and upon their arrival in Fairbanks, after being up all night, they were met by practically everyone in town. At that time Mrs. Barnette became so ill that she went to bed and stayed there the entire time. They first contemplated going to the house of a Mr. Hamil, a friend of theirs, as their home was occupied, but upon the representations of Mr. McGowan and Mr. Tozier,—that it was not safe because it was situated upon an unlighted street and on the outskirts of the town, that the minds of the people were so inflamed against them that they considered it very dangerous for them to remain there,—they went to the

Pioneer Hotel. The two children were left in California. Captain Barnette had a meeting with some of the stockholders and depositors of the bank and was trying to negotiate some form of adjustment with a view to reopening it. The situation was such that Captain Barnette obtained permission from the U. S. Marshal to carry a gun and upon one occasion he drew it. The U. S. Marshal appointed two body guards for him, one being Mr. Percy Charles. Shortly after this, and while eating breakfast in the Pioneer restaurant a Mrs. John Rapp came in and stated to Mrs. Barnette that the way to bring Mr. Barnette to time and to make him pay the depositors dollar for dollar was for some one to go to Los Angeles and kidnap the children, that that would bring him to time. Mrs. Barnette fled from the dining room and collapsed and was very ill for a number of days and under the care of the doctor. She was also visited by a Mrs. Smart, another depositor, a member of the Woman's Committee, who called upon her in her room while she was ill. This lady stated that Mrs. Barnette's husband had looted the bank and that they were living in luxury in Southern California, that if the losses were not made good the grand jury would indict him. She also asked Mrs. Barnette to give her money with which to make a payment on her house. The women depositors had decided openly to horsewhip Mr. Barnette on the streets and to tear from Mrs. Barnette's back her clothing. Notwithstanding Mrs. Barnette's statement, that she was too ill to listen, the woman insisted that she would have to listen until she had finished and left

her hysterical. Captain Barnette had been informed by Mr. McGowan and so told Mrs. Barnette, with respect to the suggestion of their leaving Fairbanks, that if they dared to leave Fairbanks they would be shot unless matters were adjusted before they left. The threats against both Mr. Barnette and Mrs. Barnette were the subject of many conversations between them. Mr. Barnette, himself, told her that there was a grand jury in session. It was reported that unless he made good he would be indicted for fraud and embezzlement. Captain Barnette had offered to put up a certain portion of his property; the depositors were not satisfied, negotiations dragged, and at each meeting most of them were surly and unfriendly, while others were pleasant.

It is proper to state here now, so as to understand intelligently what follows, that Mrs. Barnette was the owner, in her own separate right,—by virtue of transactions occurring long prior to any of these in question,—of three valuable pieces of real property in Fairbanks. Captain Barnette owned some properties in Alaska, and also a large ranch in Mexico. He had offered to put up this Mexican property as security for all claims provided they were not paid before November, 1914, which was apparently agreed to and a Mr. Schinckel was appointed trustee, to whom this property was deeded. In the meantime greater demands were being made and finally a demand was made upon Mrs. Barnette that she deed her separate property to a trustee. Mrs. Barnette was not a stockholder in the bank, had never obtained any money from the bank, never had any business deal-

ings with it, and was in nowise acquainted with its affairs or the conduct of its business. In a discussion which took place between them, in which the statement was made that the property he had submitted was of greater value than the claims against the bank, her husband said the question was not of value but of their personal safety and that if she did not put up her property, they would be assassinated. Following some further delay and some objections by Mrs. Barnette about transferring her property, she finally consented, after she had heard that Mr. Paul Fisher had threatened to shoot Mr. Barnette. Her own attorney, while advising her that she was under no obligation to transfer her property, nevertheless stated frankly that the condition was serious and he thought her husband was in bodily danger. One evening the two, while out for a walk, were met by a number of Slavonians or Greeks, who were depositors. They demanded their money and stated that unless it was paid, or property put up to secure them, Captain Barnette would never leave the town of Fairbanks alive. A short time afterwards, Mrs. Barnette executed a deed to her property, and which she signed, as she stated and as was found by the court below, to save her husband from criminal prosecution and death, her children from being kidnapped, and herself and husband being assassinated. (Opinion of Dietrich, J., 277 Fed. p. 110 et seq. Tr. p. 80 et seq.)

The *modus operandi* adopted (and this is important) by which this transaction was actually consummated, was as follows:

Mr. Schinckel was acting as trustee for the depositors' committee, or was one of the committee, and it was suggested, and papers were drawn accordingly, that this deed be made direct to Mr. Schinckel as trustee, and deeds were so executed and delivered to Mr. Schinckel. They were, however, brought back and other deeds made under the following circumstances: (Tr. p. 82.) At that time the bank was in the hands of two receivers, F. W. Hawkins and E. H. Mack. As Mr. Schinckel, himself, hesitated about accepting it, the Barnette's were induced to file a petition addressed to the judge of the court in which they asked the court to permit the receivers to accept the trust of the various properties, refused by Mr. Schinckel, which they proposed to convey in trust as security for the depositors of the bank. The judge made an order in response to this petition that, as in his opinion it was a matter that originated with the receivers, the petition be turned over to the receivers, for their consideration. (Tr. p. 55.) The receivers thereupon filed a petition (Tr. p. 56) setting forth the facts, including particularly the fact that the contemplated deed from Mrs. Barnette contained "valuable real estate that was the separate property of Isabelle Barnette" (Tr. p. 58), and asked for instructions as to whether they should accept the trust deeds and undertake the duties and responsibilities entailed upon them, or return the same to the grantors, and accompanied said petition with the trust deeds themselves. Upon this petition the court made an order permitting the said receivers to accept the

trust deeds and enter upon the trust. These papers are in the record. (Tr. pp. 45 to 59.)

At this point it may be wise to point out that so far as Mrs. Barnette's separate property is concerned, which is all that we are concerned with in this litigation, none of this property was ever at any time an asset of the bank, that is, *at the time of the failure of the bank, it had no claim, legal, equitable or moral, to Mrs. Barnette's separate property,* and, secondly, without considering reasons, which will be presented in their proper place, it is quite obvious that the receivers were entering upon the performance of a separate and distinct trust from their trust as receivers of the bank. (Op. Dietrich, J., 277 Fed. 117.)

Upon this order being made, the receivers accepted the trust deeds, one or two provisions of which, the document being Exhibit "A" to the complaint, are important to be noted at this time. The instrument is designated as a trust deed (Tr. p. 17), and commences:

> "This *trust deed,* executed the 18th day of March, A. D. 1911, by and between E. T. Barnette and Isabelle Barnette," etc. * * * "and F. W. Hawkins and E. H. Mack, Receivers" etc. * * * *"Trustees,* parties of the second part."

The instrument then goes on to recite the condition of the bank and states that the parties of the first part have granted and do grant to the parties of the second part, *"in trust for the uses and purposes hereinafter specified"* their right to the real property referred to in the deeds. And it is further provided

that such trustees are "to have and to hold the said lands and tenements *in trust,* and upon the following terms and conditions, that is to say". Various recitals, unimportant, are then made, winding up, however, with the statement that the amount of the deficit of the bank was not then known and that it could not be

> "ascertained at any particular period of time in the near future that now can be named, but will be so ascertained by or before November 18, 1914".

Accordingly therefore it was understood and agreed that the parties of the second part should take immediate possession of the property, collect the rents and proceeds, and should

> "return to the said court and its receiver the net amount of such rents, issues and profits, the same to be disbursed by the said court through its receivers pro rate to the said depositors and the owners of unpaid drafts heretofore issued by the said bank."

Authority to sell was given the trustees under the terms of the trust deed and it was distinctly provided that if by the 18th day of November, 1914, the demands of the depositors had not been fully paid, either out of the property and assets of the bank, or otherwise, or had not been paid by E. T. Barnette, then the trustees were authorized to sell at private sale the whole of the real property, turning the proceeds into the said court, liquidate the unpaid demands and deliver the overplus, if any, to the said parties of the first part. The trust deed further provided that if at any time after the delivery of the

trust deed the demands of the depositors were satisfied in full, the trustees should reconvey.

It is obvious from this mere recital of the record fact, that this was an express trust, separate and distinct from the receivership, as found by the court below (Tr. p. 94, 277 Fed. 117), *just as much so as would have been the trust had the original idea of executing the deed of trust to Mr. Schinckel, who was not a receiver, been carried out.*

After the execution of this instrument, the Barnettes remained in Fairbanks for about a week. When they left Fairbanks it was at night, secretly. Mr. Barnette went to the marshal and procured two deputies to accompany them out of town because even at that time it was unsafe to leave Fairbanks. Accordingly they left at night in a sled covered with canvas and joined the stage about 20 miles from the town. Subsequently Mr. Barnette was indicted for transactions in connection with the bank, upon some 11 counts, on all of which, however, he was acquitted with the exception of a count which had nothing whatever to do with the matters in question, a misdemeanor, the filing of a false report which Mr. Barnette signed, as stated, on a representation of his secretary that it was correct, and upon which he was fined $1000. (Tr. pp. 86-7.) The excitement continued to exist for some period of time thereafter and until he was finally acquitted, when Mrs. Barnette contemplated legal action to set aside these manifestly illegal proceedings so far as her separate property was concerned, and on the 14th of November, 1914, she brought suit in the District

Court, for the Territory of Alaska, to set this deed aside. Shortly prior to the 24th day of July, 1918, she discovered that a large amount of money, some $50,000 or more, the proceeds of rents and profits of her property, had been transmitted to San Francisco and deposited in a special fund in the Wells Fargo Nevada National Bank. This special fund, the record shows, was opened, "F. G. Noyes, Trustee" (Tr. p. 569), F. G. Noyes having succeeded E. H. Mack and F. W. Hawkins as receiver of the bank. Thereupon and on the 24th day of July, 1918, this action was brought to recover these moneys as a special trust fund belonging to her and, incidentally, to set aside the deed aforesaid as being obtained under duress, which resulted in a final decree in her favor in the sum of $31,000 upon the principles of law enunciated in the two opinions of the trial judge, found in the record. (Tr. p. 80; p. 403; 277 Fed. 110.) Except in so far as we have referred to written documents, the foregoing recital of the evidence is taken from the testimony of Mrs. Barnette (Tr. pp. 416-430, 534), but it was fully corroborated by her Alaska attorney, Mr. Tozier (Tr. pp. 441 et seq.), and it receives a substantial corroboration from the testimony of Blanche Watson (Tr. p. 554), E. T. Walcott (Tr. p. 508), Morton E. Stevens (Tr. p. 505), and John L. Sale (Tr. p. 547), who testified for the defendants.

The trial judge, as will be found by examination of his opinion, arrived at the same conclusion, except that the judge attached little importance to the threats of indictment. He said:

> "Upon the primary issue of duress I find for the plaintiff. I attach little importance to the threat of indictment, but the peril of personal violence to plaintiff and her husband, and the suggestion that her children might be kidnaped, considered in the light of all the surrounding circumstances were such as not unreasonably to cause plaintiff to yield to a feeling of fear."
>
> (Tr. p. 88; 277 Fed. 114.)

The court likewise was of the opinion that,

> "in one view of the record the transaction under consideration is without precedent, and *the controlling question is one of fact rather than of law.*"
>
> (Tr. p. 92; 277 Fed. 117.)

We now approach the second division of our statement of facts, the proceedings in the court below, which were as follows:

2. The complaint was filed on the 24th day of July, 1918. No motion to dismiss it was made, but on the 13th day of June, 1919, a verified joint and several answer on the part of all the defendants was filed. (Tr. p. 28, et seq.) This answer set up eleven separate defenses, mostly upon information and belief, as follows:

It denied specifically the allegation in the bill, that the appointment of the receiver was void for the reasons there state. As this branch of the complaint was abandoned prior to and at the trial, it passes from further discussion.

It averred that the plaintiff with her husband voluntarily surrendered the property and plead the

record facts with respect to their application to the court, heretofore recited.

It denied that the property was the separate property of the plaintiff, though the very exhibits annexed to the answer, itself showed that the property in suit, described in the complaint, was the separate property of Isabelle Barnette. (See p. 58, Ex. to ans.)

The second defense urged that E. T. Barnette was an indispensable party.

The third, that it was barred by the Alaska statute of limitations.

The fourth, that it was barred by certain statutes of limitation of the State of California.

The fifth, that it was barred by laches.

The sixth, adverse possession.

The seventh, that the property was in *custodia legis.*

The eighth, that no leave to sue the receiver had been obtained.

The ninth, that the plaintiff had ratified and approved the deed and was estopped.

The tenth, that the receiver was not a party to the duress alleged; and

The eleventh, that the plaintiff had failed to do equity.

The answer, however, contained two very important admissions to which we direct now the special attention of this court:

The first, it admitted the specific threats of duress, alleged in the complaint in great detail, and

of course, these specific threats had to be alleged, for duress cannot be averred in general language.

Secondly, it admitted that $52,000, the amount alleged in the complaint, was on deposit with the defendant bank, and that this $52,000 was the proceeds and rents of the property belonging to Mrs. Barnette.

The prayer to this answer asked for *affirmative* relief, that an injunction issue restraining plaintiff from maintaining any suit to recover the proceeds of the property. (Tr. p. 43.)

On the 7th day of July, 1919, defendants made a motion for judgment on the pleadings (Tr. p. 63) and that the suit be dismissed, and

> "that plaintiff be forever enjoined and restrained from bringing, entering or causing to be brought another action for the same cause against the defendants without the leave of the Alaska Court"

upon some twelve grounds, substantially a repetition of the defenses set forth in the answer, which motion may be regarded, in effect, as a motion to dismiss and which was on the 5th day of December, 1919, denied by Judge Van Fleet. (Tr. p. 67.)

The cause then came on for trial before Judge Dietrich on September 4, 1920, and the position of plaintiff's counsel, in view of the state of the pleadings, should not be lost sight of. Upon the issue thus presented there was, in reality, nothing to try so far as plaintiff's case was concerned because, first, the duress was admitted, and secondly, the amount of money on deposit as the proceeds of the Barnette property was also admitted. The only issue before

the court arose upon the affirmative defense set out in the defendants' answer. The following, therefore, will prove interesting:

On the day of the trial (see Tr. p. 71) the defendants asked leave to file amendments to their answer. These amendments caused the withdrawal of the admissions aforesaid, and the denial that the threats, referred to, had been made, as well as a denial that the $52,000 on deposit in the defendant bank constituted proceeds of the Barnette property, with an express admission that the sum of $30,000 was so on deposit. This admission did not arise by a failure to deny, but was an express admission under oath. (Tr. p. 69.) The complainant strenuously objected to these amendments. The court permitted them to be filed, doubtless for the reason that the cause being one in equity, it was desirous of getting at the exact truth, qualifying its ruling, however, with the statement that if the filing of this amendment at this late day prevented the plaintiff from proving her case properly, appropriate continuances in that regard would be allowed. Happily, however, the complainant was enabled to prove her duress completely by her own witnesses and, in part, by the witnesses for the defendant, and as the trial court found, upon sufficient evidence, the existence of duress, no harm in this respect was done. The matter, however, particularly in so far as the denial concerning the $52,000, and the admission concerning the $30,000, will prove to be important in another connection, pointed out post.

During the trial the complainant amended her bill by leave of court in certain respects (Tr. p. 71), to which the defendants answered. This answer was a joint answer on behalf of all defendants and was verified by the cashier of the defendant bank. The cause was then tried and submitted to the court for decision, and on December 21, 1920, an opinion was filed ordering that a judgment be entered in favor of the plaintiff. This opinion (Tr. p. 96; 277 Fed. 110) directed that the defendant Noyes produce for the inspection and use of the complainant all accounts and vouchers disclosing the manner in which the proceeds and rents from the property had been received, held and deposited, and in accordance therewith and on May 5, 1922, an interlocutory decree (Tr. p. 98), directing all the defendants to render a proper account within 90 days thereafter, was signed and filed.

Extensions of time to file this account were obtained and not until September 21, 1922 (Tr. p. 192), was this order attempted to be complied with. The 90 day period from the date of the interlocutory decree expired on the 5th day of August, 1922, so that an extension of 46 days beyond the entry of the interlocutory decree was obtained, and the account referred to was filed ten months after the decision of the court was rendered and which was a direction, sufficient in itself, for the defendants to account. The object of this delay in presenting this account is apparent in view of the following facts:

Remembering that the interlocutory decree was entered on May 5, 1922, a subsequent receiver,—Noyes

having resigned—on the 24th day of August, 1922, during the period of 90 days aforesaid (Tr. p. 238), filed a report in the receivership proceedings, which was approved by the judge of the District Court of Alaska on the same day that it was filed. This report is not important except in so far as it identified specifically the Barnette trust fund. (Tr. p. 237.) On the 28th day of August, 1922, another report was presented, identifying the Barnette trust fund as containing $53,999.16 (Tr. p. 243, 247), and which was approved on the same day as filed. On the same day still another report, special in character, was presented by the receiver during, it will be noticed, the time when the extension of 90 days mentioned had not expired. This report was likewise approved on the same day as filed. It is this report, which is of great length, that is of special import in this case, and it is proper to dwell upon it to some extent. By turning to page 253, it will be seen that the receiver represented that he had disclosed the dates and amounts of money derived from the "Isabelle Barnette properties", and referred to as "city property in the Barnette Trust fund". The receiver goes on to represent that he co-mingled these moneys with other moneys and that they had been used in paying out the general expenses of the receivership, as well as paying the last dividend to the creditors of the bank. The report further represented that there had been allowed and paid to the receivers to date the sum of $48,577.35; that there had been no charges of any nature whatever made against the Isabelle Barnette properties or the income or proceeds thereof; the report further

showed that there had been paid to the attorneys for the receivers $43,184.71, excluding an item of $15,-170.63 for certain litigation arising in Washington. The report further naively stated that it was impossible for the receiver to determine what portion of the money on deposit with the defendant bank came from the Isabelle Barnette properties, and wound up with the following extraordinary recommendation:

1/3 of the amount paid to the Receivers should be charged to the Barnette trust fund, or	$16,192.45
1/2 of the total amount paid for the Receivers' bonds charged to that estate, or	1,975.00
1/2 of all office expenses, or	3,016.75
1/4 of all salaries, or	5,053.08
The sum of $100 per month as an additional fee for handling the litigation over the Barnette trust fund, one-half of which should be charged to the Isabelle Barnette properties for the period of 11 years and 5 months, or	6,850.00
total of	$33,087.28
from this a deduction was to be taken of	1,411.05
leaving a net balance of	$31,676.23

which it prayed should be charged against the Isabelle Barnette properties. Deducting this amount from the amount which the receiver admitted had been collected from the Barnette trust fund, left a net sum of $12,185.62 as the income and proceeds from the Isabelle Barnette properties. The court approved this application in the terms in which it was presented on the same day that it was filed and appar-

ently without notice to anybody. It will be observed that upon the theory upon which this report was presented, *these charges were of no moment.* They did not swell the assets of the bank by one dollar nor give to the creditors any additional moneys. It being the theory of the receiver that the Barnette trust moneys belonged to him, it was of no moment whether these charges were made against the Barnette fund or the general fund, as the amount of the balance, so far as the creditors *of the defunct bank* were concerned, would have been the same in either case. Its manifest object was, or it was later used to attempt to accomplish, to be plead in the lower court as a bar to the accounting which had been previously ordered. For this purpose, of course, it was ineffective and was so ruled in the court below. (See Op. Taft, J. (C. C. A.), *Kirker v. Owings,* 98 Fed. 499, 511.) Aside from this, it cannot be passed without notice that there was charged for collecting rents and income from Mrs. Barnette's property, amounting to $58,801.89, the sum of $31,676.23, approximately 60% of the amount, when these collections were, in fact, made by a real estate agent whose commissions were first deducted. (Tr. p. 404.)

This was the report which the defendants in the case at bar finally presented to the trial judge as their account, and which account was not at all in accordance with the decision or said interlocutory decree. It was not verified by anybody, it contained no vouchers, no copy was served upon complainant or her attorneys, and instead of being an account of the Barnette trust fund, it contained a full account

of the receivership proceedings and other matters with which, of course, we were in nowise concerned, supplemented by an attempt to foreclose the trial court from determining the very point to which its decision was directed. And this, too, in an action in which the trust between the defendants and Mrs. Barnette was expressly denied.

Exceptions were filed to this report (Tr. p. 376), divided into two parts: Certain portions of the charges made *affirmatively* appeared without any investigation not to be proper, of which we give just one or two examples: An item of $16,192.45, one-third of the receiver's compensation; $50 per month for 11 years and five months as attorneys' fees for the trustee, when the trustee and the attorneys were both denying the existence of the trust. Various charges against the Mexican property in which Mrs. Barnette had no interest whatever; an item of $2,215.27 for the receivers' expenses from Fairbanks to Los Angeles and return; the fees of $2500 and more for an attorney in Mexico concerning the Mexican property. The other items were so blind in their character as that it could not be told whether they were, or were not, proper charges. Of such items, for example, we note, items denominated taxes, without showing to what property they applied; heat and light, Whiteley insurance, repairing sidewalk, collecting rents 12 months to date, and others, aggregating large sums.

The report, in fact, should have been stricken from the files; but in order to avoid delay and because it contained some information, such as the definite state-

ment regarding the existence of the Barnette trust fund, and the amount of money collected on that account, it was received for what it was worth.

The cause thereupon came on for further hearing before the court with respect to the matter of the amount due. Whereupon the defendants asked for leave to amend the answer "so as to admit that $30,000 or more was on deposit with the Wells Fargo Nevada National Bank in San Francisco, but to deny that said sum was realized from the rents and profits of this property". (Tr. p. 567.) Due to the fact that the original answer had expressly admitted that $52,000 were the proceeds of the Barnette property, which admission was withdrawn and an amendment allowed in which an express admission was made that there was $30,000 so on deposit, proceeds of the property, the application upon our objection was denied. (Tr. p. 56.) The ruling of the court was manifestly correct, and, in addition, so far as the amendment sought to assert that only $30,000 was on deposit in the defendant bank, it was untrue, for there had been and there then was on deposit a sum of money in excess of $52,000. From the testimony of the assistant auditor of the bank, Mr. Maher, who, immediately after the ruling aforesaid was made, testified for plaintiff, it appeared that there was then on deposit in the defendant bank the sum of $51,568.61, and that never at any time had this account been lower than $47,000 plus. A photographic copy of the account in the bank was then introduced in evidence and is in the record opposite page 568, and is headed, "F. G. Noyes, Trustee"; it is not designated

F. G. Noyes, Receiver, and shows that Mr. Maher's statement was correct. The ledger account, a photographic copy of which is also in the record, merely identified the account as "Barnette-Wells-Fargo Bank". (p. 573.)

While it is not important to trace the history of this account at this time, it may be proper to note specially the following: The defendant's Exhibit "A" (p. 679) on further hearing shows that there was deposited on March 6, 1916, $50,000 in this account. (Op. p. 387.) The deposit tag is headed "For account of F. G. Noyes, Trustee, F. G. Noyes, Receiver Washington-Alaska Bank", but it was turned into the account specifically marked F. G. Noyes, Trustee. The words, "F. G. Noyes, Trustee", on this deposit tag were written in ink over the typewriting, F. G. Noyes, Receiver, etc., and were evidently put there to correct a mistake in designating the deposit slip as F. G. Noyes, Receiver. The account was opened by a deposit on December 1, 1914, of $50,000 and was "deposited by F. G. Noyes, Trustee" (Tr. p. 584), and marked new and as "transferred from a/c F. G. Noyes".

Some other exhibits in this regard are of importance. From a photographic copy in the record, (Tr. p. 586) it will be seen that on March 10, 1915, F. G. Noyes drew a check on this account, signed by himself, F. G. Noyes, Trustee, in his own favor F. G. Noyes, Receiver Washington-Alaska Bank, for $50,000 while the original deposit of $50,000 made on December 1, 1914, was opened by a check drawn by F.

G. Noyes in favor of F. G. Noyes, Trustee. (Tr. p. 590.)

Strange to say the defendants introduced the duplicate slip of March 6, 1916, the deposit previously referred to (compare page 579 with page 589, Exhibit "F" being the duplicate slip of Exhibit "A"), which omitted any reference to the deposit account of F. G. Noyes, Trustee, due to the fact that the *original deposit slip was corrected* by writing over the words, F. G. Noyes, Receiver, the words, F. G. Noyes, Trustee. We are at a loss to understand why this exhibit was put in evidence.

During the course of the proceedings and on March 13, 1923, pursuant to leave granted on March 9, 1923, defendant, Noyes, made a further report and account which for the first time was verified. (Tr. p. 383.) This report, however, was incomplete in that it only came down to June 30, 1916, but it contained, under oath, some very important statements, of which the following at this time are the most material:

When discussing the item of $50,000 which opened the account on December 1, 1914, he stated that,

> "this represents an accumulation of the funds in the receiver's hands obtained from all sources including collections from plaintiff's property so far as the same had not been expended for dividends and current expenses of the receivership prior to the opening of the account." (Tr. p. 386.)

He then went on to state that this amount was subsequently withdrawn in the form of a letter of credit and application was made to the Treasury Depart-

ment to have these funds invested in war saving stamps and liberty bonds. An objection being interposed, on March 6, 1916, this $50,000 was redeposited in the bank and was "the same $50,000 shown to have been withdrawn from the bank in the form of a letter of credit on March 10, 1915". In other words, the original $50,000 never left the bank. Attached to this, as exhibits, was an account of the receipts and disbursements from April 1, 1911, to June 30, 1916, together with a statement of the expenses covering the same dates, leaving on deposit down to that date $27,615.03. This was the amount which the trial court fixed (see page 403) as the total amount of the net rentals for the period ending June 30, 1916, plus interest at 2 per cent upon monthly balances which the defendant bank allowed, and which the judge estimated at approximately $5000. Accordingly, he allowed the plaintiff the aggregate sum of $30,000,

> "the residue of the interest being deemed to be reasonable amount to be allowed on account of compensation to trustee." (Tr. p. 404.)

The court further stated in its memorandum opinion that the deposit represents the net rental

> "after paying not only all expenses of taxes, repairs, and maintenance, but also the collection charges paid to an agent for collecting the rentals."

From another portion of the record, however, it will appear that the total rents collected aggregated $58,801.89. (Tr. p. 404.) This being so, it is proper for us now to state the reason upon which the lower court proceeded in giving judgment for only

the $27,615.03 plus the interest aforesaid. This reason was as follows:

After June of 1916 no further deposits were made in the defendant bank account by the trustee, Noyes. From this the trial court concluded, as a fact, that

> "No moneys arising from these sources were deposited in the bank after July 13, 1916, and the rentals received by the trustee for July of that year and thereafter are excluded from present consideration, without prejudice to the right of the plaintiff," etc.
>
> (Tr. p. 403.)

Whether this conclusion is correct is a question to be determined upon the cross-appeal, but the facts as found by the court are correct and are not disputed by us.

The defendant, Noyes, was a witness on this further hearing and one or two parts of his testimony should be referred to as throwing light upon the irregular manner in which all of these transactions were conducted. When referring to the accounts which he presented, he said:

> "I did not, nor did my attorneys, start proceedings to settle my account. The judge discharged me. I sat down one evening, and he called me over there, and we sat down, and I guess we talked an hour and a half; we talked over what he would allow me, and so on. I got the bookkeeper to make out a final statement, and that was submitted to the Court, and the Court passed on it."
>
> (Tr. p. 603.)

He further stated that he was not able to state how much of Mrs. Barnette's money was down in the Wells Fargo Bank.

With respect to the first account, which contained the proceedings in Alaska and which is of great length, covering many years, he stated that while he believed it to be correct he had only examined it for half an hour because it had been prepared by somebody else. He also stated, that he was responsible for the suggestion that one-third of all the expenses of the receiver should be charged to the Barnette trust fund and the startling statement was further made, that the money in twenty dollar gold pieces was buried in his back yard and that he subsequently went out and dug it up. The following significant conversation took place between the court and counsel for the defendants:

> "The COURT. I do not know that I am quite clear about this. Do you contend, Mr. White, that you could not inform me from the exhibits taken together, with Mr. Noyes' testimony, what proportion of this fund in the Wells Fargo Bank arose from the rentals of Mrs. Barnette's property and what from other sources?
>
> Mr. WHITE. No, your Honor, I cannot. The most we can do in the matter is to give an outside figure taken from the accounts as shown by the books. The significant account for that purpose is the one of November 30, 1916, because there was never another cent sent from Alaska after November 30, 1916. We find in that the main title, Barnette trust fund, and the subtitle, 'city property'."
>
> (Tr. p. 609.)

With respect to the verified account, to which reference has been made, the witness was willing to swear that this was correct, though it was made up from the document filed September 21, 1922 (Tr. p. 612) with which he was not altogether familiar.

Certain exhibits were then introduced in evidence dealing with the Barnette account entitled, "Barnette trust funds". (Tr. p. 628.) These yellow sheets are not important except in so far as their heading is concerned.

This embodies all the evidence given at the trial and at the close the defendants again renewed their motion to amend the answer by eliminating the admission that $30,000 was on deposit, the proceeds of the real property described in the complaint, which motion was allowed to the extent that the admission conformed to the proofs, but not for the purpose of denying that any of these moneys were the proceeds of the Barnette property. (Tr. p. 637.)

It will be observed that this amount, $30,000, thus admitted to be the proceeds of the Barnette property, is within $1000 of the amount allowed by the final decision of the trial judge. Thus the judgment, in effect, so far as the amount is concerned, rests upon the sworn admission of the parties, within $1000 of the amount decreed. Indeed, the true amount is $27,615.93 and the interest is what increases this amount to the $31,000. The refusal at this late date, which was over five years after the commencement of the suit, to allow the amendment was not error (see *Montgomery v. Pac. Electric Ry.* (C. C. A.), 9th Cir-

cuit, 283 Fed. 680) and as the fact itself was proved, the error, if any, was harmless.

ASSIGNMENTS OF ERROR.

Two sets of assignments of error are found in the record. The first relate to errors in the decision of the Circuit Court of appeals, the second relate to the errors assigned upon the cross-appeal which appellant took from the original final decree in so far as the same was not in her favor. These assignments of error, respectively, are in the words and figures following:

"Now comes the complainant, appellee and cross-appellant, Isabelle Barnette, herein and files the following assignment of errors upon which she will rely upon her appeal to the Supreme Court of the United States, all as appears by the following assignment of errors (Tr. p. 722):

1. The said United States Circuit Court of Appeals in its decision herein erred in reversing the final decree of the District Court in favor of complainant, and in ordering that the above entitled action be dismissed.

2. The said United States Circuit Court of Appeals erred in finding and concluding, as a fact, that the cause of action of the complainant and appellee herein was barred by laches.

3. The said United States Circuit Court of Appeals erred herein in finding and concluding, as a fact, that the cause of action of the complainant and ap-

pellee herein was barred by any statute of limitations of the State of California or by any statute of limitations whatever.

4. The said United States Circuit Court of Appeals erred in finding and concluding in its final decision herein that any change had taken place in the status of the property since the time when the deed, sought to be attacked by the suit herein, was made by the complainant.

5. The said United States Circuit Court of Appeals herein erred in its statement of facts herein and in basing its decision upon certain facts which were unsupported by the evidence and the record and were contrary to the admissions and established proof; and in this regard it is specified as follows:

(a) The said court erred in stating, in its opinion, that the record shows that the appellee had transferred property which had been given her by her husband.

(b) The said court erred in stating, in its opinion, that the funds on deposit with the defendant bank were made up from any *sale* of the real property referred to in the complaint herein and said court erred in stating that said property had been sold and disposed of, and said court erred in further holding that any proceeds of any such sale had been distributed by the receiver.

(c) Said court erred in not holding upon the evidence of the defendant, Noyes, that he was still holding the lands mentioned in the complaint at the time of the trial.

(d) Said court erred in holding that neither the depositors nor the receivers, nor either of them, asked for the conveyance referred to, when the evidence showed, without contradiction, that said conveyance was made because of duress practiced by the said depositors, and that such duress was approved by the receivers.

(e) Said court erred in holding and in finding that said receivers were compelled by the Alaska court to receive the deeds in question when, as a matter of fact, the record shows that said court had refused to make any order to that effect.

(f) Said court erred in holding that during the delay referred to in its opinion any conditions had changed, or that any witnesses had died, or that any others had drifted away, or that any witnesses could not be brought to testify in the local jurisdiction, when as a matter of fact witnesses did appear and testify and corroborated plaintiff's testimony and evidence.

(g) Said court erred in holding that the receivers, by accepting the deed in question, were compelled to postpone any legal remedies against E. T. Barnette until November 18, 1914.

(h) Said court erred in holding that the appellee has pleaded no facts and has not testified to any facts to excuse her delay, arising from the lapse of time.

(i) Said court erred in not holding that the time during which the defendant, Noyes, was absent from the State of California, was not to be counted in

applying the statute of limitations and in applying laches.

(j) Said court erred in not holding that this suit was brought in time when the fact appears that it was brought within less than three years from November, 1914, and said court particularly erred in holding that any suit upon any cause of action could be brought prior to November, 1914, when the cause of action in question did not arise until December of 1914.

(k) Said court further erred in holding that this suit was not brought in time, when it appeared affirmatively that it was brought within three months after complainant knew that she had any right to resort to the courts of California at all.

(l) Said court erred in not holding that the complainant herein had no right, or at least was not bound to resort to any court of justice under the terms of the deed of trust, itself, until November 18, 1914.

6. Said court erred in holding, if its decision herein shall be construed as a decision upon that point, that the duress referred to terminated in March of 1911 and said court further erred in holding that said duress did not continue to and for a long time after her husband was acquitted of criminal prosecution, which was not until the beginning of 1913.

7. The court erred in reversing the implied finding of the trial court that the duress continued in Alaska until November of 1914 and even later.

8. Said court erred in not holding that the time during which the Alaska suit was pending did not

excuse the laches and that its pendency was not proof that appellee was in court vindicating her rights, and in not holding that this suit was prosecuted upon an erroneous theory for the reason that it ran against F. G. Noyes as receiver when it should also have run against him as trustee of a separate trust, and further, in not holding that the real cause of action ran against the defendant, Noyes, as trustee under a separate trust.

9. Said court further erred in holding that the removal of appellee's moneys to California was not a wrongful act on the part of the trustee and in contravention of the terms of the trust.

10. Said court erred, if its decision shall be so construed to that effect, in holding that the duress was not sufficient in law and it further erred in holding that the said duress was not proven and established beyond question, and in overruling the findings of the trial court upon that point.

11. Said court erred in denying the petition for a rehearing herein on all the grounds specified in said petition.

And the said Isabelle Barnette, complainant, appellee and cross-appellant herein, having appealed to the United States Circuit Court of Appeals by cross-appeal from the final judgment of the District Court in so far as the said final judgment and decree herein denied to the complainant the full measure of relief to which she claims to be entitled, as appears by the following assignment of errors, which said final decree

in equity was entered herein on the 23rd day of August, 1923, assigns the following errors:

(1) That the said District Court by its final decree herein erred in not awarding to the complainant herein judgment against the defendants herein in the full sum of $52,000.

(2) That the said District Court erred in its final judgment herein in not giving a judgment against the defendants herein in favor of the complainant for a sum of money in excess of the sum of $31,000.

(3) That the said District Court erred in its final decree herein in not rendering judgment in favor of the complainant and against the defendants herein in the full sum of $51,348.64.

(4) That the said District Court erred, after finding in the decree that the defendants, or some of them, were trustees of and for the complainant herein, in not awarding to the complainant judgment against them, or against some of them, for the full amount of the trust moneys shown by the evidence to have been collected by said defendants, or by some of them, particularly by the defendant, Noyes, and held in trust for the complainant herein.

(5) The court erred, after having found that said defendants and particularly the defendant, Noyes, was a trustee for complainant herein, in not fully and completely executing the trust in favor of complainant, of which it had full and complete jurisdiction by the appearance of the parties in the premises.

(6) The court erred in not rendering judgment for the complainant herein against the defendants,

and particularly against the defendant, Noyes, for the full amount of the rentals and proceeds of the property in question received by the trustee after the month of July, 1916, as appears in the evidence.

(7) The court erred in not rendering a judgment in favor of the complainant, in accordance with its opinion herein rendered in November of 1920 (277 Fed. 110), for the full amount of the rents and proceeds and trust funds collected by the defendant, Noyes, whether he collected the same in his capacity as receiver or trustee, and in not rendering a judgment against him in accordance with said opinion in both capacities.

(8) The suit being one in equity, involving a trust found to exist, the trustee having shown the full amount collected by him up to the entry of the judgment herein, to wit, the sum of $56,801.00, less such offsets as the court indicated in its opinion should be allowed the defendant, Noyes, the court erred in excluding from its consideration the trust property and trust funds accruing in the hand of the defendant, Noyes, either as receiver or as trustee, since July, 1916, as appears from his accounts herein.

Wherefore, the complainant, appellee and cross-appellant herein on this appeal, and on her appeal in the nature of a cross-appeal, prays that the said decision of the United States Circuit Court of Appeals may be reversed, vacated and set aside, and that upon the appeal of the defendants herein the said final decree of the District Court be affirmed and on her appeal and on said cross-appeal that said judgment

may be reversed or modified so that the amount thereof may be increased by such sum, or sums, as appears to have been collected by the defendants, or by any one of them, and particularly by the defendant, Noyes, either as receiver or as trustee, and in his possession as trustee for the complainant herein, and that complainant herein have judgment against the defendants herein, and particularly against the defendant, Noyes, for the sum of $56,801.00, less such credits and offsets as, in accordance with the opinion of the District Court herein, should be allowed against the fund, and that the United States Supreme Court direct that judgment be entered accordingly increasing the amount of the judgment in favor of the complainant, together with costs.

WM. H. CHAPMAN,
R. P. HENSHALL,
Solicitors for Complainant, Appellee and Cross-Appellant."

The assignment of errors on the cross-appeal reads as follows (Tr. p. 691):

"Now comes the complainant, Isabelle Barnette, herein and files the following assignment of errors upon which she will rely on her appeal, the same being in the nature of and a cross-appeal, from the final judgment herein only in so far as the said final judgment and decree herein denied to the complainant the full measure of relief to which she claims to be entitled, as appears by the following assignment of errors, which said final decree in equity was entered herein on the 23rd day of August, 1923.

1. That the said District Court by its final decree herein erred in not awarding to the complainant herein judgment against the defendants herein in the full sum of $52,000.

2. That the said District Court erred in its final judgment herein in not giving a judgment against the defendants herein in favor of the complainant for a sum of money in excess of the sum of $31,000.

3. That the said District Court erred in its final decree herein in not rendering judgment in favor of the complainant and against the defendants herein in the full sum of $51,348.64.

4. That the said District Court erred, after finding in the decree that the defendants, or some of them, were trustees of and for the complainant herein, in not awarding to the complainant judgment against them, or against some of them, for the full amount of the trust moneys shown by the evidence to have been collected by said defendants, or by some of them, particularly by the defendant Noyes and held in trust for the complainant herein.

5. The court erred, after having found that said defendants and particularly the defendant, Noyes, was a trustee for complainant herein, in not fully and completely executing the trust in favor of complainant, of which it had full and complete jurisdiction by the appearance of the parties in the premises.

6. The court erred in not rendering judgment for the complainant herein against the defendants, and particularly against the defendant, Noyes, for the full amount of the rentals and proceeds of the property

in question received by the trustee after the month of July, 1916, as appears in the evidence herein.

7. The court erred in not rendering a judgment in favor of the complainant, in accordance with its opinion herein rendered in November of 1920 (277 Fed. 110), for the full amount of the rents and proceeds and trust funds collected by the defendant, Noyes, whether he collected the same in his capacity as receiver or trustee, and in not rendering a judgment against him in accordance with said opinion in both capacities.

8. The suit being one in equity, involving a trust found to exist, the trustee having shown the full amount collected by him up to the entry of the judgment herein, to-wit, the sum of $56,801.00, less such offsets as the court indicated in its opinion should be allowed the defendant, Noyes, the court erred in excluding from its consideration the trust property and trust funds accruing in the hand of the defendant, Noyes, either as receiver or as trustee, since July, 1916, as appears from his accounts herein.

Wherefore the complainant herein on this her appeal herein, and an appeal in the nature of a cross-appeal, prays that said judgment may be reversed or modified so that the amount thereof may be increased by such sum, or sums, as appears to have been collected by the defendants, or by any one of them, and particularly by the defendant Noyes, either as receiver or as trustee, and in his possession as trustee for the complainant herein, and that complainant herein have judgment against the defendants herein,

and particularly against the defendant Noyes for the sum of $56,801.00, less such credits and offsets as, in accordance with the opinion of the District Court herein, should be allowed against the fund, and that the United States Circuit Court of Appeals direct that judgment be entered accordingly increasing the amount of the judgment in favor of the complaint, together with costs."

The case comes to this court upon a direct appeal. It was removed from the state court to the United States District Court not upon the ground of diversity of citizenship, but because it appears from the bill, that the cause of action arose under the Constitution and laws of the United States, in that an officer of the United States was sued and further, that the proceedings of a federal tribunal were attacked. Under these conditions the decision of the Court of Appeals was not final and the case is reviewable on direct appeal, which was allowed, by this court.

25 *C. J.* 868, et seq., and see note at page 869 showing that a case removed to the federal court is dependent upon the same rule as if it had originally been brought there;

Sonentheil v. Moerline Brewery Co., 172 U. S. 401;

Auten v. U. S. Nat. Bank, 174 U. S. 125;

Am. S. Co. v. Schultz, 237 U. S. 159;

Zoline, 2nd Ed. Fed. App. Juris. §§305, 306 and cases cited;

Stell v. Halligan, 229 Fed. 1013;
Frank v. Leopold, 169 Fed. 922.

*

In compliance with the rules of the court we state the various points involved directing attention, however, to the index and synopsis where these points are divided and analyzed in great detail, which is unnecessary at this time. Upon our appeal from the decision of the Court of Appeals, in so far as the decision of the court adverse to complainant is concerned, we contend:

I. THERE IS NO BASIS UPON WHICH THE RULING THAT THE CAUSE OF ACTION WAS BARRED BY LACHES, CAN BE SUSTAINED.

II. THE DURESS ESTABLISHED AND FOUND BY THE TRIAL COURT AVOIDED THE CONVEYANCE.

III. THE COURT OF APPEALS SERIOUSLY ERRED IN ITS STATEMENT OF THE FACTS TO WHICH ITS ATTENTION WAS SPECIALLY DIRECTED IN THE PETITION FOR REHEARING AND ITS DECISION IS GROUNDED UPON A STATE OF FACTS THAT THE RECORD SHOWS DOES NOT EXIST.

IV. E. T. BARNETTE WAS NOT A NECESSARY PARTY TO THE SUIT.

V. NO TITLE TO THE PROPERTY COULD BE ACQUIRED BY ADVERSE POSSESSION.

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*When opposing counsel and counsel for appellant in the Court of Appeals prepared their record they omitted as unnecessary the following papers: The papers on their application for removal from the state court to the local federal court, and the order granting the removal. They will probably admit that a motion to remand was made and was denied in the trial court, although, as stated, none of these papers is in the record.

VI. State Statutes of Limitation Are Not Pleadable In Equity In a Federal Court.

VII. There is Nothing In the Alleged Plea of Estoppel.

VIII. No Ratification of the Void Deed Ever Took Place.

IX. The Court Had Jurisdiction Over the Action and Of the Person of the Defendant, Noyes, as Receiver of the Washington Alaska Bank.

Upon the cross-appeal of complainant it is contended as follows:

1. A Court of Equity Having Acquired Jurisdiction of the Persons, the Beneficiary and the Trustee of a Trust, Will Not Enforce That Trust to Its Full Extent and Wind It Up and Where it Appears Affirmatively That the Trustee Has Appropriated a Large Sum of Money Belonging To the Beneficiary, For Another Purpose Than That Involved In the Trust, and it Appears That There Is a Fund Subject To the Jurisdiction Of the Court Composed In Part of the Moneys of the Trust, and In Part of Other Moneys, It Will Enforce Its Judgment For the Full Amount Due From the Trustee Against That Fund, Not Alone,

(a) To the extent of the known trust funds, so deposited there, but

(b) To the extent of the remaining money in that fund, when it appears, as here, that the trustee has paid to other persons, not entitled thereto, the beneficiary's moneys from another fund in an equivalent

amount, and which persons would have been entitled to those remaining moneys had they not already received the beneficiary's moneys improperly, in payment of their claims.

II. On the Other Hand, If the Foregoing Point of Law Is Not Well Taken, Then the Court Should Give Us Judgment For the Full Amount Collected By the Defendant, Noyes, As Trustee, Payable to the Extent of $31,000, Out of the Proven and Admitted Trust Moneys In the Hands of the Defendant Bank and the Balance Thereof Should Be Charged As An Equitable Lien Upon the Remaining Funds and Paid Out Accordingly.

III. Should Either of the Foregoing Propositions Not Be Well Taken, Then We Are Entitled To a Judgment For the Full Amount Collected By the Trustee and the Receiver, To Be Collected, That Part Which Is Composed Of the Specific Trust Funds, $31,000, Out Of the Defendant Bank, and the Remainder To Be Collected In Any Way Authorized By Law.

In the opinion in the Court of Appeals, only two questions are ever mentioned, and but one question is decided. (298 Fed. 689.) The case is there disposed of by the consideration of the point of laches. None of the questions argued by the appellant upon her cross-appeal was discussed, nor was any of the questions urged by appellee as grounds for reversal, other than the two mentioned, noticed. So as to present to this court the full case, therefore, we take up first the ground upon which the Court of Appeals

decided the case, with a discussion of the question incidentally referred to by that court, and follow it with a brief reference to the other grounds urged by the appellee for a reversal, unnoticed by that court.

I.

THE RULING OF THE COURT OF APPEALS, THAT THE CAUSE OF ACTION IS BARRED UPON THE GROUND OF LACHES, WAS CLEARLY ERRONEOUS.

1. To begin with, we do not see how the plea of laches is at all available to the appellees on the peculiar state of facts shown by the record here. The appellee, the Wells Fargo Nevada National Bank, is a stakeholder and is probably without any interest in the subject matter to justify the taking of an appeal or even to be heard.

Grier v. Union Nat. L. Ins. Co., 217 Fed. 293;
3 *C. J.* 625.

The other defendant, Noyes, as receiver and individually is, we think, without any standing to interpose this plea when the following facts are considered: The litigation is between the original parties, or their successors, none of whom is a bona fide purchaser, or a third person in interest. The status of the property involved is the same now as it was when the litigation was commenced and the transaction complained of occurred. The defendant, Noyes, was a trustee for the complainant and to a certain extent is now claiming adversely to the respondent, a position abhorrent to a court of equity. Originally in the case he expressly and decidedly admitted the

allegations of the bill to be true. By this we mean, that the duress alleged, the threats to murder, the threats to indict, the threats to humiliate publicly on the streets, the threats to kidnap the minor children of complainant, were admitted and were admitted to have been the foundation for the transfer by complainant without consideration to her of her separate property to a third person. This affirmatively appeared from his original answer. The only defenses set up were not defenses going to the equity of the bill. On the contrary, the equity was completely and expressly admitted; but the defenses interposed were of a highly technical nature, not one of which is even mentioned in the decision of the Court of Appeals.

In *United States v. Dunn,* 69 L. Ed. 451, at page 456, there is a statement of the principle of the law which is directly applicable to this situation and which cannot be improved upon, as follows:

> "A period of about six years elapsed between the giving of the Thomas lease and the filing of the bill. The defendants neither pleaded nor have they urged laches as a defense; nor do we find in the record any adequate basis for denying relief on that ground. One who claims the benefit derived from a breach of trust in which he actively participates, and who shows no prejudice resulting from the delay in bringing suit to compel him to account, cannot complain of laches. See *Connecticut General L. Ins. Co. v. Eldredge,* 102 U. S. 545, 548, 26 L. Ed. 245, 246."

2. The plea of laches may also be disposed of by other material considerations.

The opinion below ultimately goes off upon the point that the complainant has been guilty of such laches as bars her from a cause of action and this is, itself, apparently based upon the ground that the cause of action was barred by the statute of limitations *in California.* For in this regard the court says, "under the statutes of limitation *in California* such an action had long been barred." By this is meant that had the action been prosecuted in the state court, it would have been barred by the statute of limitations, though the court does not say what statute of limitations, and cites no case. We have, therefore, a rule or guide, so far as the court's opinion is concerned, before us and that is, What would the Supreme Court of the State of California have held in this case had this case been before it?

(1) Now, taking the very worst case against us, on the dates, a period of time, which we shall show infra not to be correct, the lapse of seven years and four months before the present suit was brought, we shall find the situation to be this: the California statute of limitations, taking everything against us, is four years.

C. C. P. § 343.

Truebody v. Truebody, 137 Cal. 172.

This leaves three years and four months of apparent bar, a short period in equity in a *Federal* court. But the statutes of limitation of a state must *all* be read together, and the state Supreme Court would have been confronted with the following situation:

(a) The suit here is a suit to follow a trust fund and that court would have been compelled to consider, first, *when* that cause of action arose in the California courts. A suit may be barred in one court and still not be barred in another, and what the Supreme Court of California would have been troubled with, would be, When did the cause of action in the present case arise in California? The answer to this would have been the fact,—not until the month of May, *1918* (Tr. p. 499) was it known that the Barnette moneys under the trust, were deposited in a special trust fund in San Francisco, Cal. Now the bank was an indispensable party defendant in this action (see *Wilson v. Oswego Tp.,* 151 U. S. 56; *Scoutt v. Keck,* 73 Fed. 900) and *prior* to that date, *Mrs. Barnette never knew that she could have resorted to the courts of California at all.* This suit was brought on July 24, 1918, within three months thereafter. It will not be pretended, of course, that this suit should have been brought in California *prior* to that date, so that it would be difficult to imagine how the statute could have been running, and a three months period, of course, after knowledge, not only falls without every statute of limitation, but without any principle of laches. This being the case, the Supreme Court of the State of California would have found, as far as the question was concerned, that this suit was not barred by any statute of limitation.

(2) But reading all the statutes of limitations together, the court would have been obliged to have held against the statute for another reason,—the time dur-

ing which any person is absent from the state must not be counted. (Cal. C. C. P. § 351.) Now, the evidence shows (Tr. p. 529), and the decree of course impliedly finds that the defendant Noyes, a non-resident of California, was absent from the state for a long period of time (Tr. p. 529.) During that period of time no statute of limitation was running against him. As to the bank, of course, it is first in no position to plead the statute as it was without interest in the controversy though an indispensable party, as any stakeholder always is; and secondly, the cause of action against the bank did not really accrue, because unknown, until the beginning of 1918. The absence of Noyes from the state, therefore, tolled the statute so far as California was concerned, except for the period of about a year. The result is, that the Supreme Court of the State of California would have found itself unable to apply the statute.

(3) Had the court chosen to, it could have felt itself bound by another contingency in this regard. The court notes in its opinion that under the deed of trust, November 18, 1914, was an important date because prior to that time the rights of all parties were unsettled *under the deed of trust itself.* On that date, for the first time the full maximum extent of the legal wrong done Mrs. Barnette was fixed. Prior to that time a lawyer would have been justified in telling her that,

> "I cannot tell you whether you have really been injured by this fraud. Sometime prior to that date this property may be turned back to you *under the deed of trust itself,* and if you

> have suffered no damage, and it is a well settled principle of law that injury without damage does not furnish a cause of action, or at least does not require you to move until you know the full extent of your damage."

With this principle in mind the Supreme Court would have been confronted with its own decision in *Savings Bank v. Schell,* 142 Cal. 505. There a widow, the executrix of an estate, fraudulently obtained a family allowance for $30,000, reaching back for many years; and much later obtained a sale of realty with intent to pay the proceeds to herself in payment of the allowance. The mortgagee of an heir, who had borrowed money to help support the widow, brought a suit in equity to enforce payment out of the proceeds of the sale in the hands of the executrix, and these facts it was first held, as is indeed the fact, manifestly stated a cause of action. As stated, a long time thereafter a sale of the property was had in satisfaction of the allowance and in the suit which was brought to recover the proceeds of the sale the point was raised that the cause of action was barred by the statute of limitations because it was not brought within the statutory time after the fraud, after the order for the family allowance, or even after the order for the sale of the real estate. And as the ruling on this point we think covers the situation, so far as California courts are concerned, we quote a somewhat long extract, as follows:

> "It is urged that the action is barred by the statute of limitations because it was not begun within three years after the order for the family allowance nor within three years after the order for the sale of the real estate. The

judgment in the case, however, does not purport to set aside the order for the sale of the real estate. The plaintiff had the option to allow that order to stand, if it chose to do so, and to seek only to reach the proceeds of any sale in pursuance thereof. It may have been satisfied that the sale under the probate order would be to its advantage, provided it still preserved its right to reach the proceeds. Where a fraudulent scheme is attempted by which another is to be deprived of property, he is not obliged to anticipate the damage from the beginning of the transaction, and his right of action to prevent the fraud does not begin to run from the time of the occurrence of the first step in the scheme, where it consists of successive acts transpiring at different times, all of which must occur to cause injury or deprivation of property. Fraud without damage gives no right of action, and the party attempted to be defrauded may, if he chooses, await actual damage or actual invasion of some right, before attempting to prevent or set aside the fraudulent act. By reason of the fraudulent practice by which the executrix obtained the order for family allowance, the law imposes a constructive trust upon her with respect to any money she might receive thereby out of the proceeds of the sale of the land. The real estate was not sold under the probate order until the year 1900, and it was not until that time that there was any money which she could obtain from this land in satisfaction of her family allowance. Plaintiff's right was in the land, the share of Frederick therein, and its injury did not occur until some disposition was made of that share which was injurious to the right. The family allowance was not a disposition of the land; it was a mere general allowance against the assets. The mere order to sell the land did not constitute a disposition of it. It was still a matter *in fieri,* and the order might never be carried out. The plaintiff's mortgage was not actually displaced and extinguished until the land

went to the purchaser at the probate sale. Then it was, and not before, that the plaintiff suffered actual loss of its right in the land, and it was upon the occurrence of that event that its right to follow the proceeds accrued. In *Hecht v. Slaney,* 72 Cal. 363, an order was made setting apart the land of an insolvent as a homestead. The plaintiff held a judgment lien, and he claimed that the homestead order had been procured by fraudulently misrepresenting the facts to the court. It was held that the statute began to run at the date of the order. The effect of the order, if valid, was at that instant to divest the lien of the judgment, and thereby the plaintiff therein was then divested of his right. That decision supports our conclusion in this case, or at all events it is not contrary thereto. The precise question here involved was not presented, nor did it arise, in that case. Here the plaintiff's right of action for the substantial part of the relief it seeks did not arise until the land was sold, which was much less than three years before the action was begun. It is therefore not barred by the statute of limitations. The court did not err in overruling the demurrer."

Savings Bank v. Schell, 142 Cal. 505, 511, 512.

The next paragraph of the opinion, after stating that "in view of the conclusion we have reached as to the time when the right to this relief arose", goes on to eliminate from the case the question of actual notice of the orders and holds that it is immaterial to the question whether if the action had been necessarily based upon the right to have the order set aside it was running because of the orders. This opinion was written by Judge Shaw, one of the ablest of our Supreme Court judges, and was finally concurred in by the entire court in bank. With this decision before

it the Supreme Court of the state would have had great difficulty in applying any statute upon two grounds: first, that not until November 18, 1914, was there any necessity of resorting to any court of justice at all; and secondly, that the plaintiff had a right to allow the deed, in that case the order, to stand and to take the proceeds of the money in the bank because of the wrong done, and this, of course, could not have been done until there were proceeds in the bank to reach.

We merely mention this situation in passing for that court doubtless would have avoided this question by holding under the statute that,—

> (a) There was no known cause of action against the bank at all until 1918; and
>
> (b) That in any event the cause of action was suspended in California during the absence of the defendant, Noyes, from the state.

In making its ruling, the Court of Appeals ignored one of the admitted facts in the case. We lay special emphasis upon this. The verified bill alleged that (Tr. p. 13) "for and during the period of three years last past the defendant, Fred G. Noyes, has been and he now is absent from the state of California." This allegation was admitted to be true by the answers. Under the statutes of California this period of time could not be counted and had to be deducted from the seven years and four months—assuming this period to be correct—referred to by the Court of Appeals. The record shows that Noyes was absent for even a longer period of time than this, and that the statute of limitations was altogether tolled *except for the*

period of about a year. (See supra.) No court, therefore, could have held that the cause of action was barred by any statute of limitations. This state of the record and the condition of the law in California was pressed upon the Court of Appeals, but no mention of either is found in its opinion.

3. Thus far we have proceeded upon the assumption of the correctness of the dates in question. As dates they are correct, but we shall now submit they are not correct as dates *when applied to the situation in this case.*

The court says in its opinion that,

> "the duress terminated upon her return to Los Angeles in March, 1911. We say terminated because we are not convinced that the fear that she may still have had that her husband would be prosecuted criminally would continue to operate as duress in law." (298 Fed. 691.)

Now, conceding this for a moment to be so, what manifestly is it that is in the court's mind? It is that in the month of March, 1911, or shortly thereafter, Mrs. Barnette could have *instituted the present suit.* But this course of procedure was not open to her until 1918 *because the cause of action did not accrue until May, 1918, when she first acquired knowledge of the deposit of her moneys in the defendant bank,* and she brought this suit within three months thereafter. As the only thing that the court is dealing with in this case *is this suit,* and if the duress terminated in March, 1911, its conclusion, that she has been guilty of laches, means *that she has been guilty of laches in instituting this suit.* The answer is that

this suit was brought within three months after knowledge of her right to bring it.

What probably is in the background of the mind of the court in this regard was that she could have prosecuted *a* suit as distinguished from *this* suit, though this is not what the court apparently decides, and that the failure to institute a proper suit for 7 years after the cause of action accrued is unreasonable laches. The answers to this contention are, it is submitted, twofold:

(a) Nobody can be guilty of laches in prosecuting a suit, *the particular suit in question,* until its cause of action has arisen, and as complainant's knowledge of her cause of action in this case did not arise until May, 1918, no laches is imputable for that reason.

(b) If now we turn to a supposed suit in Alaska which was brought,—and as to which we shall have something to say *post,*—then we are confronted with another difficulty. Aside from the point that it may have been a duty resting on Mrs. Barnette to have waited until November of 1914 before instituting any action, there is a conclusive reason for not proceeding in the Alaska courts. The condition which existed in Alaska at the times in question is best denominated by the word "savage". Even after the execution of the deed under the duress found, so serious was the public mind that Mrs. Barnette was obliged to leave Fairbanks secretly and at night. Her husband was prosecuted criminally. So high was the tension there that a change of venue was granted him. He was not acquitted until long after, and the ac-

quittal resulted in a public demonstration in which Barnette, his attorney and various other persons were hanged in effigy. Now to say that any reputable lawyer would advise his client to bring any action in Alaska under these conditions is, we think, to hold that attorneys should give bad advice to their clients, for not alone would the bringing of such a suit have been utterly futile, but it is manifest that its institution would have been dangerous. And upon this point the court below, with ample evidence in the record, made a finding as follows:

> "Assuming that in executing the deed the plaintiff was actuated by fear, she could not reasonably be expected openly to repudiate her act the moment she left Fairbanks. The danger she feared was of such character that it was not easily guarded against. From the great majority of the fourteen hundred depositors she doubtless feared no evil, but she was without means of knowing who the few were who would be unwilling to yield to the restraining of the law and would resort to violence for the purpose of intimidation or revenge. For her to have repudiated the deed as soon as she got out of Alaska would have been to intensify rather than to allay the prevailing bitterness and possibly to stir to action someone already inclined to resort to extreme measures. Besides, her husband was under indictment, and she might reasonably conclude that such action upon her part would prejudice his chances of a fair trial. The feeling was such in Fairbanks and vicinity that after a considerable length of time had elapsed the court felt constrained to grant a change of venue, and incidents occurring at Fairbanks following the trial clearly indicate that even at that time the passions excited by the failure had not become extinct."

(Tr. pp. 89, 90; 277 Fed. 115.)

From this, therefore, it clearly appears that while, so far as California was concerned, duress ceased the instant she set foot in California, no relief as to California courts was available until May, 1918, and that so far as Alaska courts were concerned, laches was certainly not running against her for a very long time thereafter.

(c) This matter may be stated in probably a better and certainly in a very telling way. The deposit of Mrs. Barnette's moneys was made in the defendant bank on December 1, 1914. (Tr. p. 572.) *This fact was not known until May, 1918;* but assume the fact to be otherwise. Prior to December 1, 1914, she could not have sued in California *at all.* Now the four year statute is the one applicable; so that taking that date, *and assuming knowledge of that date* (contrary to the fact), the present cause of action would outlaw December 1, 1918. This suit, brought within three months after knowledge, was commenced in July, 1918, *five months before the cause of action outlawed in California.* And does not the lack of knowledge of the fact giving rise to the cause of action in California until May, 1918, and the bringing of the suit within three months thereafter conclusively repel laches?

4. This being the case, we have now reached a position and a ground upon which the judgment of the trial court should be now affirmed. The cause of action not being barred by any statute of limitation, the suit was brought within time; for it is a well settled rule that where the suit is brought within the statutory period, laches does not run except in

rare and exceptional instances, of which this case manifestly is not one. The case, then, might safely, it is respectfully submitted, rest here.

5. But considering the question of laches, independently of the statute of limitations, there are some other considerations of great importance overlooked by the court, it is respectfully submitted. We state them briefly, as follows:

(a) The suit in Alaska, brought by Mrs. Barnette, was manifestly brought in good faith and concededly within the statutory period, which in Alaska may be said possibly to be ten years. *It is not at all clear that this suit was not in fact premature* (see supra and post.) (L. Alaska, sec. 843.) But this suit was brought upon an entirely erroneous theory of law and upon a misconception of the facts. The complaint in that action, set out in the record, was by the plaintiff against Fred. G. Noyes as receiver of the Washington-Alaska Bank alone. (See Tr. p. 474.) This suit could never have been maintained for the real cause of action ran against F. G. Noyes, *as trustee of a separate trust.* (See 277 Fed. 117.) The present attorneys had no participation in that suit but the attorney bringing it acted in good faith and made an honest mistake as to the nature of the cause of action. In other words, he was proceeding to protect his client's rights in court but upon a mistaken and erroneous theory, and his action, if tried, would have been defeated. Upon this point the trial court below said in its opinion, as follows:

> "But in what capacity were the trustees to hold it—as individuals or as officers of the court?

> In itself the phraseology of the deed would seem quite clearly to import the former view. Apparently the grantees were to act as trustees of the property as well as the receivers of the insolvent estate, and they are referred to in the deed as receivers only for the purpose of description and of providing a line of succession in the trusteeship."
>
> (Tr. p. 93, 277 Fed. 117.)

> "Upon the whole, I am inclined to regard the language of the deed as controlling, and hence to adopt the view that until, in conformity with the terms and conditions expressed, the property was converted into money and set apart for distribution to the beneficiaries, it was to be held by the trustees in a private rather than an official capacity, and hence would not be in the custody of the court."
>
> (Tr. p. 94, 277 Fed. 117.)

Now, bearing this in mind then, two very important facts, of which no note is made in the opinion, should continually be kept before us. The first one is, that Noyes being the trustee of an express trust, as found by the trial court and as is unmistakably the case, was guilty of an act of great wrongdoing *in transferring Mrs. Barnette's money from out of Alaska to California.* This was a wrongful act even as receiver but as against Mrs. Barnette it was a particularly wrongful act *for it was in contravention of the terms of the trust itself.* Immediately upon this removal becoming known, and within three months, this action to reach these funds was brought. The advice of counsel, that may well have been given to Mrs. Barnette, may be summed up, as follows:

Mrs. Barnette, two things are now apparent; one is, you have been mislead in law as to your cause of action. It is not against the receiver as such so much as it is against Noyes as your trustee, and it is idle to try your Alaska case because, aside from the conditions which prevail there not alone are you unlikely to obtain any judgment because of this erroneous theory, but, in addition, any judgment that you will obtain will be unavailing.

The second point is, that the money, which you claim, has been transferred to a foreign jurisdiction by your trustee and it is not only your right but your duty to follow him to that jurisdiction and pursue that money. We recommend, therefore, the doing of that which the court itself will ultimately do,—dismiss your Alaska suit and bring not alone a suit against the proper parties, to recover this money and *to impound this money so that they cannot be re-transferred and ultimately lost to you.*

This, in effect, is exactly what was done. Now, it must be remembered in addition that receivers are continually being removed in Alaska by succeeding judges for probably very good reasons. *In the present instance Noyes was removed.* (Tr. p. 126.) The responsibility of the receivers is not personally great under these conditions. But the more important fact, which should not be lost sight of, is this, and which Mrs. Barnette must have had in mind: The bond given by the receiver for the performance of his duties covered his acts as receiver *only. There was no liability on this bond for Noyes' handling of Mrs. Barnette's property or its rents.* Had such a

suit been brought upon the bond a complete defense would have been, that the bond covered only his acts as receiver and that his obligation as trustee for Mrs. Barnette was entirely beyond its scope. This was a very serious situation and when her moneys were discovered to have been deposited in California, her attorneys would have been guilty of a very great dereliction of their duty if they had not advised her at once to sequester these moneys by a suit such as the one in question. It would indeed have been difficult for her attorneys to have justified the failure to have brought this suit under these circumstances. Had Noyes become insolvent it would have been a sheer act of inexcusable neglect. And this condition arose not from the result of any of Mrs. Barnette's conduct, or of her attorneys, but from the act of her trustee himself,—the illegal transfer of her moneys to a foreign jurisdiction.

How could laches, therefore, be imputable when duty on the other hand arose?

The present suit, as stated, is against the receiver, against Noyes as trustee, and against the bank as the depositary of her moneys. No such suit had been brought, and for that matter could have been brought in Alaska, so far as the bank is concerned. Whatever suit was there brought, was brought upon an erroneous theory. Now we are brought squarely within the decision of this court, that mistakes of counsel made in good faith as to the state of the law excuses what otherwise might be regarded as laches. Probably the most eminent counsel in America prosecuted some 10 erroneous law suits

involved in *Bogart v. Southern Pacific Company,* post. Every one of these was lost because based upon some misconception of the law. After 25 years a counsel conceived of a correct theory and the rights of his client were enforced.

In the present instance, not alone was there a trust relation existing which gravely affects the application of the rule of laches, but, in addition, the trustee himself violated the obligations of his trust and brought about a condition which made the position of the beneficiary entirely different. The new counsel, therefore, who were retained, were not alone excused by the improper action theretofore brought but were confronted with an entirely different set of facts, brought about solely by the conduct of the trustee. And within three months after their knowledge of this fact they brought suit to enforce the beneficiary's rights.

It is respectfully submitted that laches can not be chargeable against the client under these circumstances.

7. At the risk of repetition, we discuss this question from another angle:

The plea was disposed of in the court below as a dry question of law adversely to the appellants by Judge Van Fleet. Later, Judge Dietrich disposed of it as a question of fact, for after review of the evidence he said, "the plaintiff's delay has not been so unreasonable that she should be denied a relief". These two rulings require a strong case to upset. But what is more important is that no amount of delay apparently, under the rulings of this court, is suffi-

cient to constitute laches unless a very great injury has been shown to the adverse party.

See *U. S. v. Dunn,* supra.

In *Southern Pacific Co. v. Bogart,* 250 U. S. 483, a delay of 25 years in a case involving many millions of dollars was held not to constitute laches, and in *Simmons Creek Co. v. Doran,* 142 U. S. 417, a delay of 41 years was held not to constitute laches. With these principles in mind, therefore, and aside from the rulings of Judge Van Fleet and Judge Dietrich, the following remarks become applicable:

(a) It has been held by this court that if a litigant is trying in a court of justice, even upon a wrong theory, to establish his rights, laches is not imputable to him.

Southern Pacific Co. v. Bogart, supra.

In other words, the period of time during which he is in court is not to be counted. Applying this principle to the case at bar, therefore, the plaintiff is under no charge of laches from the time when the Alaska suit was filed, which was on the 14th day of November, 1914, down to the time when this suit was commenced upon a more correct theory on the 24th day of July, 1918. The deed of trust was made on March 18, 1911, and remembering that the duress continued, as found by the court below, for a long period of time thereafter until at least Mrs. Barnette's husband was acquitted from the many charges brought against him, it is alleged it continued down to and after November, 1914 (Tr. p. 72) it will be found that the only delay that has been suffered covers a period of about one year.

(b) The doctrine of laches is itself founded upon some right existing in the other party. Now, it will be conceded, that there was never any right existing in the Washington-Alaska Bank to receive any portion of Mrs. Barnette's property as one of its assets. "There is no pretense that they even had any right of action against the plaintiff." (Tr. p. 91.) The foundation, therefore, for the application of laches is entirely lacking.

The language found in *U. S. v. Dunn,* 69 L. Ed. 451, will bear repetition:

> "A period of about six years elapsed between the giving of the Thomas lease and the filing of the bill. The defendants neither pleaded nor have they urged laches as a defense; nor do we find in the record any adequate basis for denying relief on that ground. One who claims the benefit derived from a breach of trust in which he actively participates, and who shows no prejudice resulting from the delay in brining suit to compel him to account, cannot complain of laches. See Connecticut General L. Ins. Co. v. Eldredge, 102 U. S. 545, 548, 26 L. Ed. 245, 246."

(c) The situation here is a very peculiar one in another respect as has already been noted. The grant was not alone to trustees but it was contingent in any event. The court below noted the peculiarity of the trust deed in this regard. The trust deed recited (Tr. p. 22) that while it was understood there was a deficit, the amount of the deficit was not known and could not be ascertained "at any particular period of time in the near future that can now be named, but will be so ascertained by or before November 18th, 1914". It then went on to provide that

if it should happen before the 18th day of November, 1914, that the creditors of the bank had not been paid out of the assets or by E. T. Barnette,—carefully excluding Mrs. Barnette,—then, for the first time, were the trustees authorized to sell all the property covered by the deed of trust and if these assets should realize more than the balance due the depositors, the overplus was to be returned. Amplifying this, the trust deed further provided that if at any time after the delivery of the trust deed the depositors were paid in full, the property itself conveyed was required to be re-transferred back.

Now, it is a very serious question as to whether or not until November 18, 1914, upon any theory, the rights of the parties had accrued in such a way as to make it necessary for anybody to resort to a court of justice. Actual legal damage, or harm in a legal sense, could not very well be known until November 18, 1914, and during this time, as we have pointed out, duress was still continuing. This point receives added force by considering the matter in the light of the statute of limitations, for it is very doubtful whether the statute of limitations as against Mrs. Barnette would ever have begun to run in any court or tribunal until November 18, 1914, had arrived.

Savings Bank v. Schell, 142 Cal. 505, p. 510.

Her suit repudiating the transaction in Alaska was filed, as we have seen, on November 12, 1914, a few days before November 18th. Upon this theory, therefore, it is apparent that not even one day of the statute of limitations or one day's laches has run under the decisions because,

(a) The Alaska suit was brought before November 18, 1914; and

(b) The time during which that suit was pending must not be counted and, in any event, so far as the statute of limitations is to be regarded as applicable in any court, the minimum of which is 4 years, the present action was brought within that time; and

(c) Both with regard to the statute of limitations and laches the complainant was not aware of her rights, as covered by the present suit, until May, 1918 (Tr. p. 499) and she brought her suit within 3 months thereafter.

(d) So as to avoid any possible misconception on the subject, it may be wise to be a little more specific on the question from another angle. Whatever may have been the original doctrine, it is now well established that so far as the courts of the United States are concerned state statute of limitations are not defenses in equity, and that great delay does not itself defeat a meritorious cause of action.

As already stated, in *Simmons Creek Coal Co. v. Doran,* 142 U. S. 417, a delay of *forty-one years* was held to be no bar to a suit. And in *Northern Pacific Company v. Boyd,* 228 U. S. 482, a judgment creditor did not sue for more than *seventeen years* after his right of action had accrued. Both these cases, however, were sustained in this court. The case which lays down the true rule is the recent and somewhat famous decision in *Southern Pacific Company v. Bogart,* 250 U. S. 483. The very first point which the

court undertook to consider was this question; and it said:

> "First. The Southern Pacific contends that plaintiffs are barred by laches. The reorganization agreement is dated December 20, 1887; the decree of foreclosure and sale was entered May 4, 1888; the sale was held September 8, 1888; and the stock in the new company was delivered to the Southern Pacific on February 10, 1891. This suit was not begun until July 26, 1913; and not until that time was there a proper attempt to assert the specific equity here enforced; namely, that the Southern Pacific received the stock in the new Houston Company as trustee for the stockholders of the old. *More than twenty-two years had thus elapsed since the wrong complained of was committed.* But the essence of laches is not merely lapse of time. It is essential that there be also acquiescence in the alleged wrong, or lack of diligence in seeking a remedy. Here plaintiffs, or others representing them, protested as soon as the terms of the reorganization agreements were announced; and ever since, they have with rare pertinacity, and undaunted by failure, persisted in the diligent pursuit of a remedy, as the schedule of the earlier litigation referred to in the margin demonstrates. Where the cause of action is of such a nature that a suit to enforce it would be brought on behalf not only of the plaintiff, but of all persons similarly situated, it is not essential that each such person should intervene in the suit brought in order that he be deemed thereafter free from the laches which bars those who sleep on their rights. Cox v. Stokes, 156 N. Y. 491, 511, 51 N. E. 316. Nor does failure, long continued, to discover the appropriate remedy, though well known, *establish laches where there has been due diligence,* and, *as the lower court have here found,* the defendant was not prejudiced by the delay."

The doctrine thus announced is sufficient for this base without considering the question that so far as the statute of limitations is concerned, it was suspended in California by virtue of the absence of the defendant, Noyes, from the state; that the duress as found by the court below continued for a long period of time (see Annotated Comp. L. Vol. 1, p. 72) and until at least, Barnette was acquitted upon the criminal charges lodged against him. (Vol. 1, p. 90.) The California statute, that would be applicable in the state court, is four years (*Trubody v. Trubody,* 137 Cal. 172), and we are within this period, for the duress is alleged to have continued until November, 1914 (Vol. 1, p. 72), while the analogous Alaska statute of limitations (Comp. L. Alaska, Sec. 843) is probably ten years. It is not thought necessary, however, to dwell upon these considerations in view of the decisions quoted from.

In *Allen v. Leflore County,* 29 So. Rep. (Miss.) 161, a wife had been induced by duress, as here, to transfer her *separate* property to protect her husband. Both the question of duress and the statute of limitations were involved, and we quote as follows:

> "It may also be true, and perhaps is, that he intended his wife's lands also; thinking, as most husbands unfortunately do, that she would do, as to her property, what he wished done. It seems to us palpably plain from this record that she did not consent, but refused, to execute the deed involving her lands, and that she never would have done so but for the threats that, if she did not, her husband would be put in the penitentiary, than which a more terrible duress could not be put on a wife"; * * *

"The choice between disgrace by imprisonment of her husband in the penitentiary, and the poverty of her little children, put by the officers of the law, is too oppressive on the heart of a wife and mother to admit of free action of the mind. *Action so influenced cannot be availed of, under the law of this land, by individuals, counties, states, potentates, or powers.*

The statute of limitations certainly cannot be relied on as commencing to run during the after two years of her life, *because her husband was alive and the duress still in force,* and the suit was brought within ten years of her death."

In *Eureka Bank v Bay,* 135 Pac. 584 (Kansas), an action involving duress, the only questions discussed were ratification and the statute of limitations; and in the following extract both are covered:

"While the pressure of the duress continued, the five-year statute of limitations did not commence to run. 25 Cyc. 1195; Howard v. Carter, 71 Kan. 85, 80 Pac. 61.

There is no basis in law or in human experience for asserting that the fear engendered by the plaintiff's threats *vanished the moment the instruments wrung from the defendants were executed. The presumption is that the influence of such threats continued,* and there is no evidence from which it can be inferred that the defendants were relieved of their apprehension within less than two months after they were placed in the jaws of the mental vise manipulated by the plaintiff's agent. The result is that no starting point for the running of the five-year statute was fixed, and the plea of that statute fails. If there be any provision of the statute of limitations other than those already noted which applies to the case, it was not brought to the attention of the trial court, and consequently the benefit of it was waived.

> The observations which have been made concerning the persistency of duress apply in part to the plea of ratification. 6 Cyc. 304 The evidence to support this plea consisted of three letters written by the defendant, R. B. Bay, two of them dated respectively January 23, 1906, and March 12, 1906. There is nothing whatever in the letters or outside of them to indicate that the original fear for his son did not still dominate the mind of the writer. The other letter was a tentative inquiry respecting a compromise of the plaintiff's claim, and did not evince such a clear and unequivocal recognition of liability as to indicate ratification."

It will not, we think, be pretended that this is not good law; and its application here lies in considering the following:

(a) So far as the California courts are concerned, there was no cause of action until December, 1914, upon which suit could have been maintained. As the suit was brought within the statutory period after *that* date, as pointed out above, it was brought in time.

(b) Now, considering the question from the standpoint of laches, independent of the statute in the light of the decision above noted, the following will prove to be important:

The amended complaint alleged (Tr. p. 72) that the duress continued down to as late as the month of November 1914, and "for some time thereafter". There is an implied finding in the decree that this allegation is true, and it is doubtful even (Tr. p. 76) whether this allegation was denied in the answer There was an express finding in the opinion of the

court that the duress continued until after the prosecutions, and the subsequent clamor, hanging by effigy, etc., had terminated in Alaska, and this was not until December, 1912, or in 1913. (Tr. pp. 435, 504.) Now, allowing for only a short period of time, say six months thereafter, for the intense feeling to have become allayed, we have the month of July, 1913, as a period when laches may be said to begin, quite aside from the circumstance that a lawyer might have advised waiting until November 1914, for the reasons heretofore stated.

This suit was commenced within five years from *that date.* Is laches imputable then when it is borne in mind that,

(a) No change in the status of the property has taken place;

(b) The grant was entirely without a shadow of consideration;

(c) There is an (implied) finding that the duress continued *in Alaska* until November, 1914, and even later;

(d) It is impossible for duress not to have continued, so far as Alaska was concerned, until the beginning of 1913—the termination of the criminal proceedings;

(e) It is very doubtful whether under the deed of trust complainant ought to have sued before November, 1914;

(f) No suit could have been maintained in California until December, 1914—the money was not deposited in defendant bank until then;

(g) It was not known until May, 1918, that complainant's money was deposited in California;

(h) Its deposit here was a breach of trust upon the part of Noyes;

(i) The suit in Alaska, though commenced in good faith, was a mistaken one in law, and the time of its pendency must be deducted, and this, if done, would leave a period of laches, equivalent to one year and over,—a period of time which itself vanishes *in toto* if *Noyes' absence from California* is allowed for.

Is this laches under *Southern Pacific Co. v. Bogart*?

One other thing should be added: Noyes admittedly is without any shadow of claim in equity to the property of plaintiff, he still holds intact that property, in fact, he has no right to resort even to that property, or its rents, until the assets of the bank are exhausted under the trust deed, *which has not yet taken place.* Is this a case for the application of the doctrine of laches at all? See

U. S. v. Dunn, supra

If the assets of the bank had been exhausted, had Mrs. Barnette's property been sold and distribution of her moneys taken place, the plea of laches might apply. But prior to that date could it in the nature of things be in issue?

To these considerations we add one other: The deed was in the nature of a mortgage. It was a contingent grant. As stated in its terms, and in a decision construing a similar grant *(Jesson v. Noyes,*

245 Fed. 46), "The property was not all surrendered absolutely", it was to be used only in the event of a deficit to be thereafter ascertained and which seems never to have been ascertained yet. Now, had it been a mortgage—as in equity it was—and foreclosure was sought, *no statute could ever bar the defense of duress.* (See *Eureka Bank v. Bay,* supra.) Under these circumstances, should the court apply laches to defeat an effort to get the property back—laches in favor of one occupying a fiduciary relation?

II.

Having discussed the only ground upon which the Court of Appeals decided the case, it may be proper to refer now to questions raised by opposing counsel, but of which no mention is made in the opinion below.

It is said in its opening, though the opinion is not grounded upon this fact, that the receivers practised no duress and that where the grantee of the deed has not instigated it, duress is no ground for avoiding the conveyance. But the situation here is very different and the answers to the holding (if it be regarded as a holding), it is respectfully submitted are as follows:

(1) The depositors who practised the duress were the beneficiaries under the receiver's trust. They were the real parties in interest. The receivers had no interest in this property and claimed none as trustees. While, in one sense, the receivers or trustees are grantees, they are not grantees holding the bene-

ficial estate, and it is submitted that it could not be the law that where the beneficial owners of the property practised duress upon another and the conveyance is made to a third person, merely to hold it for the beneficiaries, that because that third person does not actively participate in the duress, where the naked trustee did not bring the pressure to bear, that the imposed-upon party could not set the transaction aside.

See

Ziang Sung Wan v. U. S., 45 Sup. Ct. Rep. 1.

(2) In the second place the true principle on this point is stated in the following case:

In *Bryant v. Levy*, 52 La. Ann. 1649, 28 So. 191, the second syllabus, prepared by the court, reads:

> "2. When enough fear is brought to bear so as to operate on a person of ordinary firmness, regarding his reputation or fortune, it will vitiate and invalidate a contract on account of it and this although the party in whose favor the contract is made did not bring the fear to bear, and even though he was ignorant of it."

(3) It is claimed that there is no evidence in the record to prove the alleged duress. Manifestly, of course, this was a question of fact and the conclusion of the trial court upon this evidence will not be disturbed upon appeal, except in a plain case. As pointed out in our other brief, the court below held that "the controlling question is one of fact rather than of law". (Tr. p. 92.) The evidence dealing with this subject has been set forth and need not here

be re-stated; but the following suggestions are in order:

(a) We need not consider the threats concerning criminal prosecution, for the reason that the trial court did not base its decision upon the point. (Tr. p. 88.) As a matter of fact, however, the cases which have been cited by counsel, to the effect that one who has a lawful demand may attempt to collect it by threat of criminal prosecution, are not good law. Such threats, whether the demand be lawful or unlawful, constitute *extortion* and in a recent case in California an attorney was convicted of a felony and sent to prison for making threats of a criminal prosecution toward the collection of a debt which was, in fact, due.

See

People v. Beggs, 178 Cal. 79.

(b) The decision of the lower court was based upon the ground that the threats to assassinate Mrs. Barnette and her husband, to kidnap her children, to expose her in the community to public obloquy and contempt, constitute such duress as to deprive her of her free will *(Pierce v. Brown,* 7 Wall. 205); and it is submitted, it would be a travesty upon justice to hold that where a married woman with two children, to whom she owed the obligation of maintenance, support and protection, in their interest and her own, as well as in the interest of society, was induced to part with all her separate holdings for nothing to persons who admittedly had no shadow of claim thereto because of a well grounded fear that her children would be taken from her, and herself and her husband killed,

that she did not act under duress, and duress alone. In this regard the evidence affirmatively shows Mrs. Barnette's fears were indeed well founded. Her husband was guarded by a U. S. Marshall and was permitted to carry a gun. She herself was warned not to go out but to remain in seclusion in a public hotel and not to live in a private house. Even after the consummation of the transaction they left under guard secretly at night. And many of the threats made, which, however, the lower court did not regard, were in fact carried into execution. Thus, Captain Barnette was prosecuted criminally upon these very charges upon which, however, he was happily acquitted. It is submitted there can be no doubt of the sufficiency of the duress.

Baker v. Morton, 12 Wall. 150;
Pierce v. Brown, 7 Wall. 205;
Adams v. Irving, 116 N. Y. 606; 12 Am. St. Rep. 447;
Schultz v. Culbertson, 46 Wis. 313;
9 *Cyc.,* 450.

See

Lomerson v. Johnston, 44 N. Y. Eq. 93, 99; 13 Atl. 8, quoted from post.

(4) While not necessary it may be proper if the real error which infects the suggestion or intimation contained in the Court of Appeals' opinion on this point should be stated. A grant of property always arises out of contract, and is indeed nothing more nor less than an executed contract. The basis of a contract is consent, and consent is not real unless it is free. The agency which brings about the lack of

consent is not important provided it destroys the free volition of the grantor. The language of Mr. Justice Clifford, in *Pierce v. Brown,* 7 Wall. 205, is very specific on this point and we extract from it a single sentence: Where "free agency", say the Justice, is destroyed "there can be no contract, because in that state of the case, there is no consent."

A recent illustration taken from a ruling by this court in a late criminal case is likewise in point. In *Ziang Sung Wan v. United States,* 45 Sup. Court Reporter, p. 1, the question whether a confession was voluntary or not, where it had not been induced by a promise or threat arose, and it was held by this court, reversing both lower courts, that the test to be applied to determine that question was not whether it was induced by a promise or threat, but whether it was in fact voluntarily made. The language of Mr. Justice Brandeis follows:

> "In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded *whatever may have been the character of the compulsion.* and whether the compulsion was applied in a judicial proceeding or otherwise. Bram v. United States, 168 U. S. 532, 18 S. Ct. 183, 42 L. Ed. 568."

In support of both propositions in notes 3 and 4 the learned justice cites many cases. Here then is the

correct principle stated. The question is, did the complainant voluntarily and free from duress exerted of any sort, and from any source, make the conveyance? Now there can be hardly any question that she did not. This being so, her grant was made by compulsion "whatever may have been the character of the compulsion and whether the compulsion was applied in a judicial proceeding or otherwise."

III

THE COURT OF APPEALS SERIOUSLY ERRED IN ITS STATEMENT OF FACTS TO WHICH ATTENTION WAS DIRECTED IN THE PETITION FOR REHEARING.

The record showed that a petition for rehearing was filed in this case, which was denied. (Tr. p. 718.) One half of this petition was directed to showing that the Court of Appeals had based its decision upon an incorrect statement of the facts. The importance of this lies in two aspects. A litigant is, of course, entitled to have his case decided upon the facts as shown in the record, and secondly, it may almost be conceded that a decision is erroneous if it is shown that the facts have been incorrectly stated. The petition for rehearing is not before the court, but by way of showing important *errors of fact* found in the opinion of the Court of Appeals we reproduce here the language of the petition for rehearing, without quotation marks:

(a) Referring to the deed it is said that it conveyed "real estate *claimed* as the separate property of the appellee * * *". This statement is correct,

but if it is to carry with it the implication that the property in question was claimed by the appellee and that this claim was denied by anybody at any time, or that there is any suspicion attaching to this claim, then the implication is erroneous. There was never any dispute at any time by anybody that the property was Mrs. Barnette's separate property acquired long prior to any of these transactions. The answers in this case show this to be so because the answer sets up the application of the receivers and this application itself asserted that "the deed contained some valuable real estate *that is the separate property of Isabelle Barnette.*" This was signed by the receivers and approved by their attorney and filed in open court. (Tr. p. 58.) We have felt it our duty to clear up any possible misunderstanding upon this point, and in connection therewith the trial court (Dietrich, J.) found as follows:

> "The fund in question is made up of rents coming to the receiver's hands from the plaintiff's separate property so conveyed and the proceeds of a sale of one item."
>
> (Tr. p. 84.)

And again:

> "The plaintiff had had nothing to do with the bank's affairs and was in no wise responsible for its failure. She could not have been actuated by a sense of any legal or moral obligation. Her husband was turning over apparently all his personal estate. What consideration could have induced her to add her separate holdings? There was no claim against her to settle or compromise. In a civil action against her husband the most that could be hoped for was to take such prop-

erty as he had—and that he was turning over by deed, to avoid the waste of litigation, and even so neither the receiver nor the creditors agreed to withhold either civil suits or criminal prosecutions."

(Tr. pp. 88, 89.)

"There is no PRETENSE *that they even had any right of action against the plaintiff."* (p. 91.)

It is this fact which has always baldly stood out in the case,—why should a married woman owning separate property, with two children of tender age, give away her property to a bank for nothing? What equitable considerations at any time could arise in favor of such a transaction? See *U. S. v. Dunn,* 69 L. Ed. 451, p. 456.

(b) While the decision does not go off upon this ground in stating the facts concerning the duress it inadvertently omits a most important item. One fact alleged in the bill, found by the court below, was the threatened kidnaping of the minor children of plaintiff. (Tr. p. 82.) The opinion merely refers to the threats of arrest, indictment and imprisonment; the court below found that it did not think these matters affected the transaction, and it rested its conclusion upon the threats to murder, the threats of physical and bodily injury *and the threats of kidnaping.* (Tr. p. 88.) The importance of this is very great. For a threat of kidnaping might very properly have greater effect upon a mother than even a threat to take her life.

"It is happy for us that all persons, male or female, are blessed with these tender sensibili-

ties which quickly respond when peril is threatened to friend, a child, a husband, or a wife."

Lomerson v. Johnston, 44 N. J. Eq. 93, 99; 13 Atl. 8.

(c) This leads us to another point already treated upon. It is said in passing in the opinion that it is not necessary to inquire whether, under the facts found, the duress was such "as to render the conveyance voidable." The opinion does not, however, rest upon this ground. In a federal court, of course, whatever the rule may be elsewhere, the decision of this court is controlling. And in *Pierce v. Brown*, 7 Wall. 205, and cases following, relied upon by the trial court, Judge Dietrich, the rule is laid down that

"threats to take life or to inflict great bodily injury, as well as that produced by imprisonment, is everywhere regarded as sufficient, in law, to destroy *free agency, without which there can be no contract,* because in that state of the case, *there is no consent*".

(d) It is said that the complaint alleged that

"the receiver had received $52,000, the proceeds of the *sale* of said property and deposited the same with the Wells Fargo Nevada National Bank,"

and on a later page, it is said,

"in the mean time to her knowledge the property was being administered, *sold* and disposed of and the proceeds distributed by the receivers."

With all due respect to the court, the Court of Appeals, it has been misled through some fault of ours as to what the complaint alleges, and as to what the fact is, and

we conceive this error to be of great importance. *The complaint does not allege the sale of the property.* The amended complaint alleges that there was deposited in the defendant bank proceeds of rents and profits of the property. (Tr. p. 73.) The property is as intact today as it was at the time it was conveyed to the trustee, except that a small piece, about which there was an understanding had with a third person that it should be conveyed *prior* to the deed to the trustee, was carried out with Mrs. Barnette's consent, and the proceeds, $2500, substituted. The very fact that she was required to assent, although she had no knowledge of it, it being done by her agent under power of attorney, is proof of the attitude of the trustee and it would have been a breach of faith on her part to have objected. Nor is it true that the property was sold and disposed of and the proceeds distributed by the receivers. *None has been sold or disposed of.* Not a proceed has been distributed by the receivers to anybody, even to this very day. Indeed, this act would have been itself in contravention of the deed of trust.

The evidence on this point is conclusive. Noyes, *the defendant,* testified:

> *"I am still holding* ALL *lands mentioned in the complaint* and still administering upon them under orders of the court in Alaska, the Fourth Judicial District."
>
> (Tr. p. 533.)

(e) The error of fact, found in the first subdivision hereof, is carried a little later into another statement,

where it is said that the receivers were justified in believing that the appellee

> "in thus surrendering property which had been given her by her husband was inspired only by her desire to assist him in paying his debts."

This is said in connection with the statement,

> "that neither the depositors nor the receivers asked for the conveyance."

As already stated, there is no evidence in the record that this property was conveyed to her by her husband. The statement, that neither the depositors nor the receivers asked for the conveyance, is contrary to the finding of the trial court, that the depositors caused the conveyance to be made by reason of the threats, found, while the receivers, if they did not participate in the threats, asked for instructions from the court as to whether they should accept the conveyances. This situation is accentuated by another error, for it is said that

> "against their judgment they were *compelled* by the court to receive it * * * ".

We beg leave to direct attention to the record, page 58. The receivers asked for

> "instructions and directions of the court as to whether we shall accept the said trust deeds",

which were submitted. The court did not compel them to receive it, it merely advised that you "*may* accept the trust deeds". (Tr. p. 59.) The court had previously *refused* to make an order, other than to turn the matter over to the receivers "for their consideration". (Tr. p. 55.)

(f) The following paragraph of the court is important to be noted:

> "During her delay conditions have changed and it is reasonable to assume that to the appellants' disadvantage some witnesses have died and others have drifted away from the jurisdiction in which the transactions here involved occurred, and could not be brought to testify in the court below in a jurisdiction 3000 miles distant from the place where the cause of suit arose. The receivers by accepting the deed were compelled by its terms to postpone their legal remedies against Barnette until November 18, 1914."

It is respectfully submitted that there is no evidence in the record that the delay caused any change in conditions. On the contrary, the affirmative showing is (see Noyes' testimony, quoted supra), that at the time of the institution of this suit and at the time final judgment was entered in this action, the conditions were precisely the same as they were when the conveyances were made. It is also said, that some witnesses may have died and others have drifted away from the jurisdiction. This would be important if it were not for the fact that the defendants introduced evidence upon the point of duress themselves, after having originally admitted it, and that it is from the evidence of these very witnesses, in part, that the duress has been established. And it is respectfully inquired, who is it that is responsible for the trial in the court below, 3000 miles away from the place where the cause of suit arose? This is due to the fact that the trustee violated his duty toward the appellee by transferring her moneys from without the jurisdiction of Alaska.

In treating of this question of duress the court said again, "she made no objection to the sale of her property by the receivers", and we can only reply that, except as above noted, no such sale has taken place and the property is still intact.

(g) In the interest of precision we just note one or two other points. It is said, and properly said, in the opinion that "the mere institution of a suit does not of itself relieve from the charge of laches", citing cases. This is true in the light of the following facts appearing in those cases. There delay had ensued prior to suit and great delay in one case, for example, 20 years, in prosecuting the suit. The lower court gave judgment for defendant upon that ground, and on appeal it was held that the delay anterior and the delay in prosecuting the suit were grounds for affirming the judgment. But this principle of law, with which we have no quarrel, it is respectfully submitted, has no application to the present case. Here was a case in which a suit within the principle of the *Bogart* decision was brought in Alaska upon an entirely erroneous theory. *It ran against Noyes as receiver when it should have ran against Noyes as trustee,* as found by the court below, and as must be admitted to be the fact. When, pending the suit, the trustee for Mrs. Barnette was guilty of an additional wrongdoing against her by transporting her moneys without the jurisdiction of Alaska and her attorneys ascertained that fact, plus the fact that the suit there brought was not the kind of suit, though brought in good faith, which the law warranted, the delay was not only excused but a duty

was imposed upon her attorneys to call attention to this situation and to bring a proper suit in the jurisdiction in which her money was deposited, and this they did within three months.

(h) It is also said that,

> "The appellee has pleaded no facts, nor has she testified to facts to excuse her delay or repel the presumption arising from the lapse of time."

We can only answer that the bill and the amended bill in this case did plead such facts and that there is testimony upon that point, as to conditions prevailing, the transmission of the money to California, the knowledge of that fact, the bringing of the suit here within three months thereafter, and the finding of the court in its opinion and impliedly in its decree in our favor on all those points. It may also further with propriety be said that while the defendants plead laches they introduced no evidence of any kind showing that they had been damaged, hurt or injured by any delay.

See

U. S. v. Dunn, supra.

(i) There must have been some very strong consideration moving the trial court to make the finding which it did make on the question of laches. Probably the causes which influenced the judge were things that do not directly appear upon the face of the record, as follows:

The manner and mode of the testimony of the witnesses; the attitude of the parties towards the litigation; the extraordinary attitude of the trustee

when testifying towards the court itself, which only inferentially appears in the record (Tr. p. 602 et seq.); the apparent lack of good faith on the part of Noyes, trustee, in making up his accounts, and other considerations that may readily suggest themselves that occurred during the trial, such as, the trifling conduct of the receiver where, after the court had ordered an account of the trusteeship, *Noyes endeavored to foreclose the presentation of such an account by proceeding improperly elsewhere.* It may have been further influenced by the fact that Noyes, though defending on behalf of the depositors, wronged his beneficiary, Mrs. Barnette, under the express terms of the trust, by attempting to charge one-third of the expenses for merely collecting the rents, after a commission had been paid to an agent for their collection, as the court below found in its decree. (Tr. p. 406.) And the judge may also have been somewhat surprised to learn that upon one theory these charges amounted to sixty per cent of the collections.

These charges, of course, would, *in the event that Noyes was successful* here, ultimately go against the depositors of the bank; and it is not far to argue that but little harm could have been done under these circumstances, by returning to complainant what she had given to the bank, and which was never one of its assets. At any rate, after hearing everything, the judge found as a fact upon evidence satisfactory to him that the delay was not unreasonable and such finding is, of course, not lightly to be disregarded on appeal.

IV.

The objection is made, that E. T. Barnette is an indispensable party. The answer to this contention is plain. The litigation involves only Mrs. Barnette's separate property and as to this property, of course, her husband was neither a necessary nor a proper party plaintiff or defendant. The fact that he joined in the trust deed conveying the property is wholly immaterial, for this joinder *was made solely for the purpose of conveying by the same instrument his own property* and the situation is the same as if Mr. Barnette had conveyed his property by one instrument and Mrs. Barnette her property by another. This objection is a strange one; and it seems to be coupled with an intimation that Mr. Barnette had some interest in this separate property though, as we have pointed out, the very exhibits annexed to the answers of the defendants show the property in question to be, as it was in fact, Mrs. Barnette's separate property. (Tr. p. 58.) The objection is wholly immaterial for another reason. Mr. and Mrs. Barnette are no longer husband and wife, and in view of a recent statute (Jud. Code, Sec. 246, as amended 1919) this court would hardly reverse the judgment and direct the joining of the husband who, under the law, could not now be joined at all.

V.

There has been an intimation made about title to the property being acquired by adverse possession.

But how could a trustee acquire title by adverse possession as against his beneficiary?

VI.

Certain statutes of limitation, both of Alaska and of the State of California, are referred to as constituting a defense. It is, however, too well settled to be the subject of controversy that State statutes of limitation are not only not defenses in a federal court in equity, but they cannot even be set up as a ground of defense.

Bogert v. S. P. Co., 250 U. S. 483, affirming 224 Fed. 61 (C. C. A.);

Kirby v. Lake Shore etc. R. R., 120 U. S. p. 138.

VII.

The point, that the complainant has failed to do equity, is suggested but exactly what counsel are driving at is not pointed out. An action to set aside a transaction based upon the ground of fraud or duress can hardly involve the principle that the person wronged is required to do equity. But in this case the court below in the exercise of its discretion awarded to the defendant, Noyes, as trustee, "the residue of the interest in defendant bank" as a "reasonable amount to be allowed on account of compensation to the trustee". (Tr. p. 404.) This was interest on the moneys of Mrs. Barnette over and above $31,000 and in view of the fact that the

trustee had denied the trust (see *Irvine v. Dunham,* 111 U. S. 327) if there was error in this, it was error against the beneficiary.

VIII.

This disposes, also, of the further contention, that the complaint should have been dismissed "because plaintiff by her conduct, having caused the defendant receiver and his predecessors in office to forego valuable rights as well as criminal prosecution was estopped from asserting rights", etc., and continuing, "in the words of the maxim, 'he who seeks equity must do equity'."

Neither civil nor criminal rights were foregone and an agreement to forego a criminal prosecution would, itself, have been a crime. That an understanding to forego a criminal prosecution could give rise to the application of the maxim that "he who seeks equity must do equity", is a strange contention.

IX.

1. The next point seems to be that plaintiff ratified this transaction. Here it is well to bear in mind the difference between fraud and duress. Where one is induced to do an act fraudulently he supposes that he is, in fact, doing something different from what he has done and whenever he becomes acquainted with the actual facts, or when such circumstances exist such as put him upon notice, his rights spring into being. In the case of duress the

wronged party knows exactly what he is doing but his mind is compelled to do that which, however, he would not otherwise have done. The time, therefore, when he may assert his legal rights is dependent upon entirely different considerations and the duress may be regarded as continuing for a long time subsequent. For example: where one is put in jail, or unlawfully imprisoned, and informed that he will be kept in prison until he executes a deed, his release from jail does not at once operate to release him from the duress. The fear engendered in his mind still continues and we must await a period of time when the innocent party feels free to act.

The plaintiff is neither a business man nor a lawyer and her case must be viewed in a very different attitude from the case of one who is threatened with duress as against himself alone. The duress here affected her husband and children as well as herself.

This distinction is clearly recognized in the case of *Allen v. Leflore County* (Miss. 1901), 29 So. 161, where duress was regarded as running during the remainder of a wife's life because her husband was alive when she had been induced to transfer her property under a threat of the district attorney to prosecute her husband for crime.

Eureka Bank v. Bay (Kans. 1913);
25 *Cyc.* 1195; 135 Pac. 584;
Blither v. Packard (Me. 1916), 98 Atl. 929.

The judge of the court below evidently had this in mind, for he said, as follows:

> "Assuming that in executing the deed the plaintiff was actuated by fear, she could not

reasonably be expected openly to repudiate her act the moment she left Fairbanks. The danger she feared was of such character that it was not easily guarded against. From the great majority of the fourteen hundred depositors she doubtless feared no evil, but she was without means of knowing who the few were who would be unwilling to yield to the restraint of the law and would resort to violence for the purpose of intimidation or revenge. *For her to have repudiated the deed as soon as she got out of Alaska would have been to intensify rather than to allay the prevailing bitterness and possibly to stir to action someone already inclined to resort to extreme measures. Besides, her husband was under indictment, and she might reasonably conclude that such action upon her part would prejudice his chances of a fair trial.* The feeling was such in Fairbanks and vicinity that after a considerable length of time had elapsed *the Court felt constrained to grant a change of venue,* and incidents occurring at Fairbanks following the trial clearly indicate that even at that time the passions excited by the failure had not become extinct."

(Tr. of Record, pp. 89, 90.)

These remarks are very pointed in the present case; and it would be a singular thing to expect Mrs. Barnette immediately to assert her rights in view of the character of the threats that had been made against her, especially with a pending criminal prosecution on nine counts against her husband. Whether she regarded him as guilty or innocent is not important. She owed him at least the obligation of not making his position in the criminal courts worse, and for her, pending the criminal prosecu-

tions, to have attempted to recover back her property would have been a betrayal of her duty as wife.

2. Some point is made over the fact that a deed of a small piece of property was executed by an attorney in fact for Mrs. Barnette in 1913, and ratification is claimed. The answers are plain: first, Mrs. Barnette was then subsisting under a condition of duress, and, as remarked below, an attempted repudiation immediately *after* or during the duress, might have brought on greater disaster than if she had originally refused to convey the property; secondly, Mrs. Barnette was not then in Alaska and did not personally sign this deed. She had no personal knowledge of the transaction whatever; and as soon as she was able, she repudiated the original transaction in toto, by suit in Alaska. It is very doubtful whether the agents of a party, who has been deprived of his property by duress or force or menace, can ratify or confirm the act of deprivation by their acts unless (a) they show the express approval of the principal, and (b) his freedom then from the duress or force or menace.

St. Louis & S. F. Ry. Co. v. Gorman, 100 Pac. 647, 650 (Kans.);

Iron Co. v. Sherman, 20 Md. 117.

A contrary doctrine would open the door, at once, to the perpetration of another fraud, and here a distinction is to be noted,—the good title which the innocent grantee might obtain because of a lack of knowledge of the duress is one thing; the confirmation, as against the perpetrators of the duress, or those chargeable with it, of the act of the agents,

unknown in fact to the principal, is another and different thing. In the first case, the innocent grantee would get a good title; in the second case, the principal who in fact has not confirmed, has lost none of his rights against those who wronged him. Thirdly, as pointed out, it is very doubtful whether plaintiff could lose any rights or remedies by inaction or action, prior to November 18, 1914. Fourthly, when the nature of the transaction in question is clearly understood, it will be seen to be immaterial. Aside from the execution or non-execution of the deed of trust, Mrs. Barnette apparently was under some sort of an obligation to convey this property, to the purchaser *for a consideration, before* even the deed of trust was signed; and all that was done was to carry out the antecedent understanding.

"I think the Second Avenue place is known as the Seigenger place; I may be confused on that. There was a piece of property sold in Fairbanks, as Mr. Noyes testified.—I am not positive that that was the Seigenger property, or a part of that property. I may be confused on that. There was a piece of property sold that I understood was a piece of property *that Barnette had promised someone or claimed that he had given them an oral option on it.* That may be the Seigenger property, or it may be a piece of property in that vicinity. I am not positive as to that."

(Tr. of Record, p. 538; Testimony of Leroy Tozier.)

"At the time I made the sale of the Second Avenue property I consulted Mr. Tozier and Mr. Bob. Lavery. I talked with Mr. Tozier about selling the property, and as I understood the

trust deed it was understood that we could sell by agreement *prior to the time that the deed became effective;* I told Mr. Tozier that they wanted to put up a picture house, and there was a good chance to sell it, and it was a very poor piece of property to rent; I talked to Mr. Tozier and I talked to Mr. Lavery, who was representing the Barnettes, and after I guess a month's negotiations the property was sold."

(Tr. of Record, p. 530; Testimony of F. G. Noyes.)

The remarks of the trial court on this subject are apropos:

"The case presents but few elements of estoppel. Criminal prosecutions were not stayed or prejudiced by the execution of the deed. There is a suggestion, but no proof, that the receivers refrained from bringing civil actions against Barnette for this reason. Neither the deed here nor the other deed conveying his individual holdings was given or accepted upon the condition that any existing right of action be waived. Nor is it perceived how the acceptance of this deed could, as a matter of law, operate to extinguish any such right. So far as appears, he had no other property that could be reached by execution. That it was the only property he had in Alaska was the belief of the receivers when they applied for instructions, and in the absence of evidence to the contrary it is reasonable to assume that they withheld civil actions because they were convinced that any judgment they might obtain would be worthless. There is no pretension that they ever had any right of action against the plaintiff."

(Tr. of Record, p. 90.)

X.

The last point urged by counsel is that the court had no jurisdiction of the subject matter of the action "or of the person of the defendant, F. G. Noyes as Receiver of the Washington-Alaska Bank" because no leave to sue had been obtained and because the *res* was under the exclusive jurisdiction of the Alaska court. These two propositions involve the same idea, expressed in different language, but following the order of counsel it may be convenient to consider them separately.

(1) Even where there is no statute authorizing a receiver to be sued, as here, the true principle is, that the failure to obtain leave to sue does not go to the jurisdiction. The rule is one of comity and not of jurisdiction. Considerable confusion is found in the decisions upon this point but when the origin of the statute, presently to be quoted, is given, the situation clears up.

The objection, that a receiver cannot be sued without the consent of the court appointing him, is said, by the weight of authority, to be a rule of comity, though some cases hold it to be jurisdictional defect.

Tardy's Smith on Receivers, Sec. 748;

High on Receivers, 4th Edition, Sec. 254a;

Walcott v. Shriner, 153 Ind. 35; 74 Am. St. Rep. 278 and note,

which quotes from

Ray v. Pierce, 81 Fed. 881, where the reasons for the rule are given.

It is interesting to note that Judge Caldwell's original views on this question were endorsed by Mr. Justice Miller, and subsequently adopted by Congress.

Dow v. Memphis & S. R. R., 20 Fed. 260;
Central T. Co. v. St. Louis, 40 Fed. 426;
Alderson on Receivers, Sections 525-526.

But whether the defect be regarded as jurisdictional, or as arising out of comity, the authorities are all agreed that it may be waived (see *Tardy's Smith on Receivers*, Sec. 751); and we think it was waived here when,

(a) The receiver answered *to the merits* jointly with two other defendants, who could be sued, and who couldn't raise the objection;

(b) When the defendants *jointly* applied for leave to amend so as to answer to the merits on the issue of duress; and

(c) When they applied jointly to the trial court for affirmative relief—an injunction against the plaintiff.

> "While the better considered authorities formerly supported the proposition that leave to sue the receiver was jurisdictional in its nature, the great weight of authority, as the result of the later decisions, sustains the opposite view, and it is accordingly held that the failure to obtain leave is not jurisdictional and that its omission is not fatal to maintaining the action." (Numerous citations.)
>
> *High on Receivers, 2nd Edition*, p. 297.

> "It has already been shown that the weight of authority supports the doctrine that want of

leave to sue is not jurisdictional. And where the rule thus prevails, it follows that where a receiver against whom an action has been instituted without the leave of the appointing court, *enters his voluntary appearance in the cause or in any other way submits himself generally to the jurisdiction of the court and defends upon the merits*, the objection is thereby deemed to be waived. Thus, a motion to dismiss an action brought against a receiver, upon the ground that leave of court was not first had before beginning the action, *is waived by appearance of counsel for the receiver*, such appearance being an admission that defendant has been regularly brought into court. Want of permission, therefore, to bring an action cannot be urged as a ground for dismissal *after such appearance on the part of the receiver.*"

High on Receivers, page 309.

"*When the receivers filed a general demurrer to the bill, such act constituted a general appearance on their part;* they made no motion to have appellant attached for contempt in having filed its bill without leave, nor did they make a motion to dismiss the bill because such leave had not been granted."

Fox River Paper Co. v. Western Envelope Co., 109 Ill. App. 401;

See

4 *C. J.* 1340.

(2) We have shown the objection itself may frequently impliedly be waived because it is not jurisdictional. But in the present case it was expressly waived. So far from obtaining any order from the Alaska court as for contempt or from procuring an order from the Alaska court requiring the complainant to abandon her litigation, *the Alaska court dis-*

tinctly and unequivocally directed a defense upon the merits.

Before pointing this out it may be well to note that the receiver himself waived the objection distinctly. He made no motion to dismiss upon this ground, or, for that matter, upon any ground. He made no objection prior to the filing of his answer. Now, it is well settled that an objection of this character, like an objection to a want of jurisdiction over the person, and many other objections concerning jurisdiction where citizenship is concerned and involved, must be made preliminarily or they are waived. Here not alone did the answer plead to the merits but the receiver himself specially invoked the jurisdiction of the local court by asking the trial court for an order restraining the plaintiff from prosecuting any action concerning the subject matter, and for general relief.

(3) All this leads, however, up to the order which the Alaska court made in the premises, and which we quote in full, as follows:

"(Title of Court and Cause.)

ORDER TO ENTER ACTION, ETC.

Upon reading the affidavit of F. G. Noyes, the receiver herein, filed in cause No. 2075 of the causes in this court, and upon hearing the plaintiff herein and his counsel, Fernand de Journell, and it appearing to the Court that Isabelle Barnette has entered, in the City and County of San Francisco, State of California, an action against F. G. Noyes, the receiver herein, for *the recovery of certain trust funds* belonging to the estate represented by said receiver, and the Court being fully advised in the premises,

It is hereby ordered that the plaintiff herein and his counsel proceed hence to San Francisco and that said counsel, under the direction and with the consent of said plaintiff, take such steps as may be necessary *to defend such action or actions as may be brought by any claimants* to the funds of the receivership herein, and more particularly that certain action brought by one Isabelle Barnette to recover *certain funds realized out of the properties granted by her under a deed of trust* to said receivership for the purpose of securing the creditors of the Washington-Alaska Bank, and also *to enter such other actions by way of counterclaim or otherwise against said person or persons or claimants or other persons whomsoever,* as such receiver may see fit and proper and that for all such purposes said receiver may incur and be allowed such expenses, including attorneys' fees. as may be suitable and necessary in the premises, all of which may be advanced by and taken from the general funds of the receivership in his hands, and *thereafter charged to and taken from the trust funds realized out of the properties covered by the deeds of trust* of E. T. Barnette and Isabelle Barnette *whenever same are released to and obtained by him, said receiver."*

(Tr. of Record, pp. 114, 115.)

The language of the deed of trust, Tr. p. 22 et seq.

This order is manifestly the equivalent of an order permitting the receiver to be sued made subsequent, an order of ratification. This becomes clearer from its terms, for it first designates and recognizes the existence of the trust fund, so far as Mrs. Barnette is concerned, quite separate and distinct from the assets of the bank, as it proposes to first charge the expenses of the litigation against the general funds

of the receivership and thereafter to charge them against the trust fund of Mrs. Barnette's "whenever same are released to and obtained by him, said receiver".

All questions, therefore, as to the authority to sue the receiver seem to be out of this case.

(4) But strong as these reasons may appear, the lack of merit of the objection may be well based and better grounded upon the conclusion of the court below, that the Barnette trust was a trust separate and distinct from the receivership. The reasons are not far to seek:

(a) The original plan contemplated the transfer of the Barnette properties to Mr. Schinckel. He would have been a trustee under the deed of trust had this plan been carried out and manifestly he could have been sued in any court having jurisdiction of his person. The receivers, however, took the place of Mr. Schinckel but they took his place as trustee: The grant was not made to them as receivers, they were referred to as receivers merely for identification. The grant was made to them as trustees and in trust and for the uses and purposes therein set forth and not otherwise. This was the conclusion of the trial judge after considering the terms of the trust deed, to which we have referred.

(b) The Alaska court always regarded this trust as separate and distinct from the receivership trust. The order above referred to we think conclusive. Why was the receiver authorized to charge the expense of the litigation over the Barnette trust first

against the general receivership funds and then charge them back against this separate trust? This made no difference to the general creditors of the bank. By this method of bookkeeping they realized nothing more or less from the assets but it made a great difference to Mrs. Barnette, and that was the very theory upon which the Alaska court made the enormous charge of ⅓ of the expenses against this separate trust, so as to give rise to the claim that if Mrs. Barnette was entitled to anything she was only entitled to a very small balance. It was undoubtedly upon this theory that the charges of sixty per cent of the rental for collecting her rents, excluding the expenses of a collector, were made against the income of her property. (Tr. p. 261; Brief pp. 18-20.)

(5) The law upon this point seems equally to be clear. The first quotation on this point is from Tardy's Second Edition of Smith on Receivers, Volume 2, page 2035, as follows:

> "A receiver may be sued without leave of court where he takes property not embraced in the receivership, since in such a case he is not entitled to the protection of the court."

The language of the court in *Nevitt v. Woodburn,* 190 Ill. 289, is, *in* principle, applicable here:

> "The defense chiefly relied on and urged upon us as sufficient ground for the reversal of the decree is, that appellant Nevitt, *having been appointed by the court trustee to execute the trust created by the will,* was to all intents and purposes *a receiver of the court,* and that having reported to and acted in pur-

suance of the orders and directions of the court in the cause wherein he was appointed, his acts as such officer cannot be called in question in any other cause, and that it is a contempt of court to bring suit against a receiver without first having obtained permission of the court and in the cause in which he was appointed. The general doctrine contended for by the appellants as applicable to receivers need not be denied, but we are of the opinion that Nevitt did not occupy the position of receiver, *but only that of trustee charged with the duty of executing the trust created by the will and in the manner provided by that instrument.* A receiver is a person standing indifferent between the parties, appointed by the court to receive and preserve the property or fund in litigation pending the suit. He is an officer of the court, appointed for a temporary purpose, and has no powers except those conferred on him by the order by which he is appointed, and such as are derived from the established practice of courts of equity." (Citations.) "But a trustee may be appointed by a will, deed or in other ways, without the order of any court and without a suit pending, and his powers, as a rule, are governed by the instrument creating the trust, and not by decree of court. *Property in his possession as trustee is not in custodia legis, as in the case of* receivers or other officers of the law or of the courts, and he may be called to account by any court of equity obtaining jurisdiction. We find nothing in the record to authorize the conclusion that Nevitt was appointed receiver of the fund in controversy, *in the sense contended for, as an officer of the court,*" etc.

Now, it is of course conceded that the property never was an asset of the bank. The theory that the Alaska court conceived it as such and consequently ordered it into the possession of the receiver is an-

swered by the case just quoted from, which is directly in point. But, in addition, as facts, the following is important: First, the receivers in their petition for instructions advised the judge that there was included in the deed some valuable real property, the separate property of Mrs. Barnette. Second, the order was permissive only, the fact being that the persons acting as receivers simply wished to know whether the acceptance of this separate trust would be inconsistent with their duties as receivers. The receiver had no power to refuse control over the property, *if it was an asset of the bank,* for this would involve him in a failure of duty. Third, since the property was not an asset of the bank, and the suit in which the receiver was appointed was not in any way concerned with it, the order was simply void and no protection whatsoever to the receiver.

> "And where a demand against a receiver arises from his having taken *unlawful possession* of property which is not included in the trust, and which does not involve his administration of the trust, he may be held personally liable *even though he took possession under an order of court.* Beach on Receivers (Ald. Ed.) Secs. 723, 2208."
>
> *Kirk v. Kane,* 87 Mo. App. 274, 280.

If the title to land held by a receiver is decreed by the court to be vested in another party, it becomes subject to execution for the debts of such party, even though the receiver is not formally discharged by the court.

Very v. Watkins, 23 How. (64 U. S.) 469.

"To the extent that an order for the appointment of a receiver purports to place property which is not the subject matter of the litigation, in his hands, it is in excess of the jurisdiction of the court *and void.*"

Tardy's Smith on Receivers, Second Ed., Vol. II, p. 1993.

"It seems now to be settled law that where a receiver takes property that belongs to a third party, *although he may do so innocently in the belief that the property belonged to his trust,* he is liable for conversion and may be sued as of right by the person whose property he has converted." (Citations.)

"Under these authorities after the demand by the appellants and a refusal by the temporary receiver to deliver the moneys so received, an action against him personally might have been brought without the permission of the court."

Fallon v. Egbert Woolen Mills Co., 56 N. Y. App. Div. 586.

"The receiver, however, is protected by the court, only as respects the property of which he is directed or authorized to take possession *by the order of his appointment.* If he assumes to interfere with property not embraced in the decree, *and to which the estate never had title,* he is *not* acting as an officer of the court, but is a mere trespasser, and the owner of the property need not obtain permission of the court to sue the receiver for its possession: Hills v. Parker, 111 Mass. 508."

Quotations from an article by H. Campbell Black in 25 Am. Law Register (N. S.) 289, 300.

It will be conceded that, admitting momentarily the validity of the deed, Mr. Noyes did not hold the

trust property at the same time as receiver and as trustee. That he was acting as a trustee is demonstrated by asking the question whether, if the receivership should end, Mr. Noyes' duties in regard to the trust property would cease? Suppose that the court allowed a voluntary dismissal of the suit to which the receiver was ancillary? Obviously his receivership would end, though the court might allow a little time for the readjustment and redelivery of property; but would the duties of Mr. Noyes end in regard to the trust property? The trust was created by deed and the dismissal of the suit could not in any way affect the terms of that instrument.

The following additional extract from *Nevitt v. Woodburn,* 191 Ill. 283, is also in point:

> "It is said, however, that the order appointing Nevitt required him to perform all of the duties that had devolved upon Sanborn as receiver, and *that thereby Nevitt became receiver, an officer of the court, and not merely a trustee under the will, in lieu of Ege. We cannot so conclude.* In the first place, that part of the order was confined to collections from Ege and the disposition of such collections. The continuation of the receivership, except as to certain matters not then fully settled in the then pending litigation, became unnecessary except as to such matters, after the appointment of Nevitt as trustee under the will and his assumption of the duties of the trust, but Sanborn continued to act as receiver for some time after Nevitt was appointed. The duties of Nevitt, when appointed, were measured, in character and duration, *by the trust itself, not* by the orders of court entered in the then pending suit. Receivers may be, and often are, appointed to take possession of the fund from the trustee in order to preserve it pending a suit for the removal of

and an accounting by such trustee. *In such a case it could not be said, either that the receiver was the trustee or that the trustee was the receiver.* Nor could it be said, after the removal of the trustee and the appointment of another and the discharge of the receiver, that the new trustee was a receiver and *not liable to be called on to account except by application to the court in the cause in which he was appointed. The practice, in equity, in such cases is too well understood to require citation of adjudicated cases.*"

Hills v. Parker, 111 Mass. 508, is a well considered case, which discusses the principle lying at the foundation of the rule for which we contend. As this case has been approved by the Supreme Court of the United States, and as it further notes that even where a suit is brought against a receiver without leave this is no defense,—an injunction to restrain the action should be obtained,—and as it finally winds up with the very distinction that we have in mind, we quote from it somewhat fully:

"All the decisions cited for the defendants relate to property *in which the person or coporation whose estate has been* placed by the court of chancery in the custody of a receiver *had a title.* In such a case, the property in the hands of the receiver as an officer of the court is in the custody of the law, and cannot therefore be seized or sold on execution, or distrained for rent, without leave of the court which appointed the receiver. Wiswall v. Sampson, 14 How. 52. Russell v. East Anglian Railway Co., 3 Mach. & G. 104. Noe v. Gibson, 7 Paige, 513. Robinson v. Atlantic & Great Western Railway Co., 66 Penn. State, 160. And the question whether creditors claiming a paramount right, by mortgage or otherwise, in the property of the debtor, shall be permitted to enforce their rights by action at law

against the receiver, is within the control of the same court, which may treat the bringing of *such an action without its leave as a contempt of its authority;* but leave to bring such an action, when applied for, is granted by the court of chancery as of course, unless it is clear that there is no foundation for the claim; and *when the action is brought without applying for such leave, the possession of the receiver is not necessarily a valid defence at law,* and the court of chancery, if applied to for an injunction, may in its discretion allow the action to proceed to judgment and to be defended by the receiver. Bryan v. Cornis, 1 Cox Ch. 422. Anon. 6 Ves. 287. Angel v. Smith, 9 Ves. 335. Brooks v. Greathed, 1 Jac. & W. 176. Aston v. Heron, 2 Myl. & K. 390. Randfield v. Randfield, 3 De G., F. & J. 766.

The decree of a court in chancery appointing a receiver entitled him to its protection only in the possession of property which he is authorized or directed by the decree to take possession of. *When he assumes to take or hold possession of property not embraced in the decree appointing him, and to which* THE DEBTOR *never had any title,* he is not acting as the officer or representative of the court of chancery, but is a mere trespasser, *and the rightful owner of the property* may sue him in any appropriate form of action for damages or *to recover possession of the property illegally taken or detained.* Parker v. Browning, 8 Paige, 338. Paige v. Smith, 99 Mass. 395. Leighton v. Harwood, ante, 67."

But the case which really states the principle in language too clear to be misunderstood, is the case of *Barton v. Barbour,* 104 U. S. 126. There an action had been brought prior to the enactment of any statute permitting receivers to be sued, and the question had to be disposed of upon general principles. It was disposed of upon an argument concerning receiver-

ships, that an act of the receiver who took possession wrongfully was an *ultra vires* act, and therefore that he could be sued, and the opinion cites *Hills v. Parker,* supra. The court said, at page 134:

> "Very analogous to the case of an assignee in bankruptcy is that of a receiver of an insolvent railroad company or other corporation. Claims against the company must be presented in due course, as the court having charge of the case may direct. *But if the receiver by mistake or wrongfully takes possession of property belonging to another, such person may bring suit therefor against him personally as a matter of right; for, in such case, the receiver would be acting ultra vires.* Parker v. Browning, 8 Paige, 388; Paige v. Smith, 99 Mass. 395; Hills v. Parker, 111 Mass. 508. So far the case seems plain."

(6) Aside from all the foregoing, we are within the letter of the statute in this case, which, we think, expressly covers it. This statute reads as follows:

> "§ 1048. (Jud. Code, § 66). SUITS AGAINST RECEIVER.—
>
> Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

Counsel at great length quote extensively from decisions contsruing this statute with a view to maintaining that it has application only to the acts of the receiver *during the course of the administration of*

his receivership,—even upon this point the decisions are very conflicting. The statute, of course, itself answers one objection,—the objection about interfering with the *res,* for in no instance could a receiver ever be sued without interfering *with the res.* But we need not enter into any detailed anaylsis of these decisions, for the reason that under counsel's own theory of them we are still within the express terms of the statute. That theory is, quoting from certain of their decisions, as follows:

> "The permission given by the third section of the judiciary act of 1887-1888 to sue receivers of Federal Courts for acts or transactions of theirs in carrying on the business connected with the property, without leave of the appointing court is not restricted to the courts having jurisdiction of the receiver and the property, or to the Federal Courts generally, *but extends to any court of competent jurisdiction, and the appointing court has no power to enjoin the Federal Courts.*"
>
> (App. brief p. 65.)

And in *Buchanan v. Davis,* 135 Fed. 707:

> "This act provides that suits may be brought against receivers in certain instances therein specified without leave of the court. It was clearly the intention of Congress to restrict the cases wherein suits are to be brought without permission of the court *to acts and transactions of the receiver in carrying on the business intrusted to his care,* and the statute in question cannot be construed to mean that suits may be brought against a receiver to establish any right to the property which may be placed in his custody without the permission of the court. The property being at all times under the control of the court of administration, it would be absurd to

> permit the institution of suits in another forum to recover such property to diminish its value."
>
> (App. brief p. 69.)

Now, following this theory, it is quite manifest, we think, that the receiver here is sued in respect of an act or transaction of his in the conduct of the receivership, which arose subsequent to his appointment. *None of this property was ever an asset of the bank at the time of the receiver's appointment.* By virtue of certain acts, conduct and transactions *of the receiver subsequent,* he acquired possession of this property; the transactions referred to which gave rise to the cause of action were acts by him subsequent to his appointment as receiver; they were acts and things done to the injury of a third person as much so as in a personal injury case, admittedly within the statute, and against a person who was nowise connected with the receivership at the time of its inception. This fraud and duress *a tort* was practised since the receiver's appointment; this trusteeship was created since that appointment; all these accountings arose since the appointment, and to the extent that he is sued as receiver he is sued in respect of those acts and transactions, and those alone.

Many of these transactions were, as the Supreme Court well expresses it, (supra), *"ultra vires."*

Still another of the cases cited by counsel, in effect states in another form the distinction, and we quote from counsel's brief on page 67, as follows:

> "The act of Congress relating to such suits authorizes them to be brought without leave of

the court only where the suit so instituted is because of some act or transaction of the receiver in carrying on the business connected with the property in his possession. If a receiver appointed by this court *has negligently discharged his duties, and thereby has caused an injury to another,* he can be sued therefor in any court of competent jurisdiction; and if he has made a contract as such official, and thereafter refused or neglected to observe the terms of the same, he may be sued concerning it within another jurisdiction, without the permission of this court, for in such instances the suits would be in respect to his act in carrying on the business connected with the property in his custody."

Coster v. Parkersburg, 131 Fed. 115.

From these cases it is established, and every other case cited by counsel is to the same effect, that a receiver as such,—and that for the purposes of the present discussion we assume that we are suing the receiver as such and not as trustee of a separate trust,—may be sued where, as such receiver, a cause of action in favor of a third person arises out of a contract made by him, or a tort committed by him or his agents. In the present case from the standpoint of the receiver the contract in question was an executed grant by the plaintiff to him containing, however, many executory features and contingent in character. From our standpoint this contract was brought about as the result of a tort, a duress practiced upon the plaintiff. In either event, we are entitled to sue him under the plain terms of the act itself.

Finally, the following extracts from the controlling decisions of this court are important:

> "Certainly, the preservation of general equity jurisdiction over suits instituted against receivers without leave does not, in promotion of the ends of justice, *make it competent for the appointing court to determine the rights of persons who were not before it, or subject to its jurisdiction;* and the right to sue without resorting to the appointing court, which involves the right to obtain judgment, *cannot be assumed to have been rendered practically valueless by this further provision of the same section of the statute which granted it.*"
>
> *Railway Co. v. Johnson,* 151 U. S. 81,

quoted and approved by Fuller, C. J., in *Gableman etc. v. Peoria,* 179 U. S. 335.

In *McNulta v. Lockridge,* 141 U. S. 327, the court said:

> "Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver; and his contracts, misfeasances, negligences, and liabilities are official, and not personal, and judgments against him as receiver are payable only from the funds in his hands. As the right given by the statute to sue for acts and transactions of the receivership *is unlimited, we cannot say that it should be restricted to causes of action arising from the conduct of the receiver against whom the suit is brought, or his agents.*"

From these considerations and authorities it follows that in the respect in which this suit may be thought to be maintained against the receiver, it is even within the principle of the act of Congress, though, as we have already pointed out, it is quite unnecessary to rest the decision upon this ground. The foregoing

disposes of all the contentions urged on the defendants' appeal.

Upon the cross-appeal of the complainant there arise, under the assignment of errors already quoted, three questions of law which may be stated, as follows:

As the suit was in equity and was brought in part to enforce a trust, and as the court had full jurisdiction over all the parties to the suit, the trustee, beneficiary and others, should it not have awarded to the beneficiary the full amount which the particular trustee before the court had collected for her, to-wit, the sum of $56,801.89, less certain offsets which we have always been willing to allow? We shall be very brief in our discussion of this question, which is solely one of law and which for convenience we divide into three parts:

I. A Court of Equity Having Acquired Jurisdiction of the Persons, the Beneficiary and the Trustee of a Trust, Will Enforce That Trust to Its Full Extent and Wind It Up, and Where It Appears Affirmatively That the Trustee Has Appropriated a Large Sum of Money Belonging to the Beneficiary, for Another Purpose Than That Involved in the Trust, and It Appears That There Is a Fund Subject to the Jurisdiction of the Court Composed in Part of the Moneys of the Trust, and in Part of Other Moneys, It Will Enforce Its Judgment for the Full Amount Due From the Trustee Against That Fund, Not Alone,—

(a) To the extent of the known trust funds, so deposited there, but

(b) To the extent of the remaining money in that fund, when it appears, as here that the trustee has paid to other persons, not entitled thereto, the beneficiary's moneys from another fund in an equivalent amount, and which persons would have been entitled to those remaining moneys had they not already received the beneficiary's moneys improperly, in payment of their claims.

II. On the Other Hand, if the Foregoing Point of Law Is Not Well Taken, Then the Court Should Give Us Judgment for the Full Amount Collected by the Defendant, Noyes, as Trustee, Payable to the Extent of $31,000, Out of the Proven and Admitted Trust Moneys in the Hands of the Defendant Bank and the Balance Thereof Should Be Charged as an Equitable Lien Upon the Remaining Funds and Paid Out Accordingly.

III. Should Either of the Foregoing Propositions Not Be Well Taken, Then We Are Entitled to a Judgment for the Full Amount Collected by the Trustee and the Receiver, to Be Collected, That Part Which Is Composed of the Specific Trust Funds, $31,000, Out of the Defendant Bank, and the Remainder to Be Collected in Any Way Authorized by Law.

I.

A COURT OF EQUITY HAVING ACQUIRED JURISDICTION OF THE PERSONS, THE BENEFICIARY AND THE TRUSTEE OF A TRUST, WILL ENFORCE THAT TRUST TO ITS FULL EXTENT AND WIND IT UP AND WHERE IT APPEARS AFFIRMATIVELY THAT THE TRUSTEE HAS APPROPRIATED A LARGE SUM OF MONEY BELONGING TO THE BENEFICIARY, FOR ANOTHER PURPOSE THAN THAT INVOLVED IN THE TRUST, AND IT APPEARS THAT THERE IS A FUND SUBJECT TO THE JURISDICTION OF THE COURT COMPOSED IN PART OF THE MONEYS OF THE TRUST AND IN PART OF OTHER MONEYS, IT WILL ENFORCE ITS JUDGMENT FOR THE FULL AMOUNT DUE FROM THE TRUSTEE AGAINST THAT FUND NOT ALONE.

(a) To the extent of the known trust funds, so deposited there, but

(b) To the extent of the remaining money in that fund, when it appears, as here, that the trustee has paid to other persons, not entitled thereto, the beneficiary's moneys from another fund in an equivalent amount, and which persons would have been entitled to those remaining moneys had they not already received the beneficiary's moneys improperly, in payment of their claims.

The facts in this connection, given in resume form, are as follows:

The court below had jurisdiction of all the parties and of the trust fund to whatever extent it existed in the defendant bank. The defendant bank was a proper, if not an indispensable party defendant.

See:

Wilson v. Oswego Twp., 151 U. S. 56.

It is a well settled principle of law that a court of equity having taken jurisdiction of a controversy, will dispose of it in its entirety. Authorities upon this point are ample, especially in the case of trusts, and in the case of fraud or duress.

Now we have accepted,—because from motives of policy we deemed it advisable to accept,—the statement of the defendant, Noyes, as to the full amount collected. The full amount collected, down to January of 1922 was $56,801.89, which embraces the period of time between 1911 to January, 1922. This appears from Noyes' own report. (Tr. p. 326.) (783+56,018.89=56,801.89. See pp. 100, 326, being a part of exhibit annexed to report.) There was on deposit in the hands of the defendant bank the sum of $52,442.27. (Tr. p. 521.) The judgment in the court below proceeded upon the theory that of this sum $31,000 was composed of the Barnette trust moneys, and it arrived at this conclusion as a matter of fact, because after July of 1916 there were no further deposits of any kind made in this fund at all. Upon the evidence this conclusion as a matter of fact was correct and as a proposition of law, therefore, the court below restricted its judgment against the defendant to the extent of this $31,000, providing in its decree that it was without prejudice to the plaintiff to pursue any other remedy for the balance of the money due her. Whether the court ought not to have given us judgment for the full amount, admittedly due, involves the question of law now to be considered.

To the foregoing facts must be added the following: After and during the time that the court had rendered its decision requiring the defendant, Noyes, to account, and during the period of 90 days specified in the interlocutory decree and the extensions thereof, the defendant, Noyes, as receiver, undertook to ap-

propriate the trust moneys of Mrs. Barnette to the extent of the difference between $31,000 and $56,-801.89, for the benefit of and for the account of another and distinct trust, to-wit, his receivership trust and has either paid out, or is about to pay out to the beneficiaries of that trust, whom he represents in this proceeding, Mrs. Barnette's moneys. In other words, the situation stands thus: if we assume the beneficiaries of this other trust were at any time entitled to *such* moneys on deposit with defendant bank, being the difference between the $31,000 and $52,-442.27 on deposit there, it appears that they have received the equivalent of these moneys out of Mrs. Barnette's money to the extent of the difference between $31,000 and $56,801.89, moneys that they were not really entitled to. If this misappropriation, therefore, is to stand, Mrs. Barnette is restricted to the $31,000. Therefore, if the difference between the $31,000 and the $52,442.27 in the defendant bank, is credited to the other trust, the receivership trust, and paid out to the beneficiaries thereof, then these beneficiaries are receiving their moneys twice, and Mrs. Barnette is being deprived of her just claims. The suit being in equity and the trustee and the receiver being before the court, and there being a large sum of money subject to the jurisdiction of this court, the question of law arises as to whether there has not been, in effect, an equitable conversion of the entire money in the hands of the defendant bank to and for the account of Mrs. Barnette by virtue of the acts of the trustee. No harm has been done by so holding because the beneficiaries of the receivership trust have

either been or will be paid the exact amount that is due them. Authorities upon this point are difficult to find. There is, however, at least one case which we think is applicable and which, if applicable, is of controlling force.

National Bank v. Insurance Co., 104 U. S. 54, is a leading case on this point. After referring, with approval, to the famous English case, known as the *Hallatt* case, the court approves and quotes from the New York Court of Appeals in *Van Alen v. Bank,* 52 N. Y. 1. The language of the Federal Supreme Court is as follows:

> "The same doctrine was strongly maintained by the New York Court of Appeals in the case of Van Alen v. Bank, 52 N. Y. 1. In that case it was decided that when an agent deposits in a bank to his own account the proceeds of property sold by him for his principal, under instructions thus to keep it, a trust is impressed upon the deposit in favor of the principal, and his right thereto is not affected by the fact that the agent at the same time deposits other moneys belonging to himself; *nor is it affected by the fact that the agent, instead of depositing the identical moneys received by him on account of his principal, substitutes other moneys therefor.*"

The italicized portion of this decision is what is important. Here the trustee, the equivalent of the agent in the case cited, admittedly has on deposit in the defendant bank $31,000 of the specific trust moneys of Mrs. Barnette. He admittedly has in his hands $56,801.89. The defendant bank, who has no interest in the controversy, admittedly has on deposit the sum of $52,997.27 to the credit of the trustee, or

agent, in a fund designated as a trust account. The trustee, in other words, has therefore "substituted some" of his own moneys in the trust account, that is, the difference between $31,000 and $56,801.89, for the specific moneys to that extent belonging to Mrs. Barnette; and if it be true, as held by this court, that the *principle of law* is not affected by the fact that the agent "instead of depositing the identical moneys received by him on account of his principal substitutes other moneys therefor", then, in equity, the court ought to regard all the moneys in the hands of the defendant bank as trust moneys of Mrs. Barnette, provided it does not exceed the full amount of her claims against the trustee, and in this case it does not, but falls short of that sum.

This principle of law received added force from the following considerations:

The receiver has appropriated $30,686.86 of Mrs. Barnette's money in Alaska. That money he has converted into another trust account and is about to pay it or has paid it out to persons admittedly not entitled thereto. He has the equivalent of that amount, belonging we will say to those other persons, in an account in San Francisco, subject to the jurisdiction of this court in which account there is admittedly specific moneys belonging to Mrs. Barnette. Why is not this misappropriation of the receiver of Mrs. Barnette's moneys, pending this suit, this actual conversion and appropriation of Mrs. Barnette's money in Alaska to the receivership account, an equitable conversion or assignment of the receivership moneys in

the same amount in San Francisco to Mrs. Barnette's account?

> "The doctrine that money has no earmark must be taken as subject to the application of this rule."
>
> *National Bank v. Insurance Co.,* 104 U. S. 54, 69; quoting and approving *In re Hallett,* 13 Chan. Div. 696, 707.

Otherwise a strange result is achieved. Mrs. Barnette is asked by this court to assist in paying an obligation admittedly not due from her. To put it more stringently, a court of equity is solicited by a trustee to aid in misappropriating moneys to another account, because the trustee confesses that some of the beneficiary's moneys have already been misappropriated and paid to the other account.

The position may be restated thus: The receiver says, I have misappropriated $30,000 of Mrs. Barnette's money in a foreign jurisdiction to the benefit of other persons who are not entitled to such moneys. I have the equivalent amount of money in my hands here belonging to those other persons, whom I represent mingled with an admitted portion of Mrs. Barnette's moneys in a fund subject to the jurisdiction of this court. I now ask this court to turn over to me those moneys which those other persons would have been entitled to, had I not already appropriated an equivalent amount of Mrs. Barnette's money to their account.

Will a court of equity do this? Will a court of equity allow it to be done, pending a litigation in which the trustee was notified that these moneys were

claimed, and when it appears that since the rendition of the judgment here that Mrs. Barnette was entitled to these moneys, the receiver has according to his own confession converted her own moneys in Alaska? Here is an instance for the application of the rule, that a court of equity will treat that as done which ought to have been done.

See the admirable discussion of this doctrine where the opinion in the *Hallett* case is said to be "marked by a keen sense of equity and strong common sense", and referring to the case of *National Bank v. Insurance Co.* found in *Richardson v. New Orleans etc. Co.,* 102 Fed. 780; pp. 783, 784 (C. C. A.). See also, *Santa Marina Company v. Canadian Bank of Commerce,* citing *In re Hallett,* which was affirmed by this court in 254 Fed. 391 on another point without noticing the discussion in the trial court.

Elizalde v. Elizalde, 137 Cal. 634, 641;

Moore v. Jones, 63 Cal. 12.

From these two latter cases, we quote the following extracts:

> "*So long as the amount in the fund is greater than the amount of the trust fund it will,* in the absence of any showing to the contrary, be presumed to be that held in trust. Whether the moneys are mingled in one account at a bank or kept together in the strong box of the trustee is immaterial."
>
> *Elizalde v. Elizalde,* 137 Cal. 634, 641.

See:

Richardson v. New Orleans etc. Co., supra.

> "The fact that the husband had commingled her money with the moneys of other persons did

not divest her of her rights to her separate fund. It was in the hands of the husband as her agent and trustee, who was entitled by law to the control and management of it. Commingling it with the money of others did not destroy it as her separate property, nor change the relation of trustee and cestui que trust as to its custody, to that of debtor and creditor. 'Money has no earmarks, and for that very reason the mingling of trust with private funds can injure no one. *The value being the same, and it being a matter of the most perfect indifference whether parties get the same or other coin, so they get the sum to which each is entitled, there can result no injury to any one. Common sense will not discuss the question of identity, when nothing useful can result from its determination.*' "

Moore v. Jones, 63 Cal. 12.

And we against refer the court to the case of *Richardson v. New Orleans etc. Co.,* 102 Fed. 763, where the entire law covering trust funds, as stated by the Circuit Court of Appeals with extracts from such high authorities as Judge Taft, Judge Gray, and others. The quotations we think too long to set forth here in full.

The court is now in a position to appreciate the force of the original admission which was made and subsequently withdrawn by the defendants, under oath, that all the moneys on deposit with the defendant bank were trust moneys, the proceeds of the Barnette property.

It would seem to us, therefore, as if in equity this entire fund in the hands of the defendant bank must be regarded a trust fund belonging to the complainant, otherwise a great wrong has been done her. It

will, of course, be conceded that the power of the court of equity to deal with unusual and extraordinary conditions and to mold its decree so as to grapple with a peculiar situation with a view to doing equity, is not open to question.

See the following strong decisions, exemplifying this principle:

Sharon v. Hill, 20 Fed. 1, p. 3 (bottom);
S. P. Co. v. Robinson, 132 Cal. 408.

It should be remembered that it is not the complainant that has shown this set of facts. It was established by defendants. We have simply taken their sworn statement upon this point.

II.

ON THE OTHER HAND, IF THE FOREGOING POINT OF LAW IS NOT WELL TAKEN, THEN THE COURT SHOULD GIVE US JUDGMENT FOR THE FULL AMOUNT COLLECTED BY THE DEFENDANT, NOYES, AS TRUSTEE, PAYABLE TO THE EXTENT OF $31,000, OUT OF THE PROVEN AND ADMITTED TRUST MONEYS IN THE HANDS OF THE DEFENDANT BANK AND THE BALANCE THEREOF SHOULD BE CHARGED AS AN EQUITABLE LIEN UPON THE REMAINING FUNDS AND PAID OUT ACCORDINGLY.

It is, of course, well settled law that a court of equity abhors a mutiplicity of suits, and having taken jurisdiction of the controversy, especially as between the beneficiary and the trustee, will dispose of the whole litigation and wind it up.

Now, if we are not entitled to the kind of judgment, just indicated, then it is respectfully sub-

mitted that we are entitled to a judgment against the trustee for the $56,801.89 admittedly collected by him for the account of the beneficiaries, payable as follows: to the extent of $31,000, found and admitted to be specific trust funds, payable out of the defendant bank, and to the extent of the difference, the court will charge an equitable lien upon these moneys subject to its jurisdiction and order payment in satisfaction thereof accordingly.

See:

Matter of Mumford, 5 N. Y. St. Rep. 304;
Menude v. Delaire, 2 Desaussure 563 (S. C. Equity);
Miller v. Miller, 148 Mo. 113;
Leary v. Corvin, 106 Am. St. Rep. 543; 181 N. Y. 222; 73 N. E. 984;
Arrett v. Corser, 21 Beav. 52; (S. C. 1. Jur. N. S. 882; 3 Weekly Rep. 604);
In re MacDougall, 175 Fed. 400;
Story's Equity Jurisprudence, § 1248, page 594;
National Bank v. Life Ins. Co., 104 U. S. 54.

In view of the fact that the question of law here involved does not ordinarily arise under the circumstances disclosed in this record, it may be proper if we do more than just cite the cases, but, in addition, state the facts in each case noted and give some extracts from them:

In the *Matter of Mumford,* supra, the petitioners, who were the administrator and heirs at law of the deceased, applied for an order directing a general assignee in trust to pay certain moneys alleged to

have been held by him in trust for said petitioners out of the assigned estate before the creditors were paid. The principle that a trust fund, improperly diverted, may be followed into the hands of those who shall receive it except in good faith and *bona fide*, was recognized "the trust character being imposed upon them as well as the original estate".

In that case the trust fund, consisting of certain bonds and their proceeds, were applied by the insolvent to pay certain debts and the question was not alone whether the trust fund could be followed, but whether "the estate was secured by the assignee cumbered with an equitable lien thereon therefor", and the court then said:

> "Another principle is recognized as attaching to a trust estate in favor of the beneficiary, and that is where the holder having the same in custody for a lawful purpose, in harmony with the proper execution of the trust, *shall unlawfully appropriate the same to his own use and benefit, and he thereby enhances the amount and value of his estate,* the amount of the trust estate thus converted *becomes an equitable lien upon the entire estate of the wrong doer valid,* and which may be enforced against anyone holding such estate, except he be a *bona fide* purchaser or transferee thereof. People v. Bank of Dansville, 39 Hun. 187; McColl v. Fraser, 40 Hun. 111.
>
> The fund in question in the hands of Dow, Short & Co., was a trust estate held by that firm by its unlawful appropriation of the property and assets of the firm; was enhanced to that amount and the estate in the hands of the assignee were increased to that extent. By the payment of the debts and the discharge of the liabilities of the partnership and although no part of the money or securities comprising the

trust estate came into the possession of the assignee, the entire estate passing to them *was charged with an equitable lien in behalf of the beneficiaries,* for the trust estate thus wrongfully converted by his assignors, *and he received the same burdened with such lien.*

If right in the above conclusions, it follows that the petitioners are entitled to be paid out of the estate of the wrong doers in the hands of the assignee, the amount of the money or property misappropriated, and converted before the payment of the general creditors of the assignors."

In *Menude v. Delaire,* 2 Desaussure, 563, supra, the second question the court proceeds to consider, stating it in its own words, is as follows:

"2nd. Whether defendant's testator is to be considered as a trustee for complainant, as to $2500 received for her plate sold in 1804, with which he purchased negroes; which negroes are either to be considered as hers. or he made responsible for the amount of the purchase money?"

and with regard to this question the court said:

"With regard to the 2nd question, it is evident from the paper adduced, that Dr. Polony sold a considerable quantity of plate belonging to the complainant, amounting to $2500, and with that money he declares he purchased negroes for his plantation: and further, that for that sum his estate is indebted to complainant, until he should put all his business in order.

This must either be considered as a declaration of trust arising by implication, *or it must be considered as an equitable lien; in either view it will have ultimately the same effect;* with this difference only, that if it is considered as a declaration of trust, the individual negroes will

be bound; *but if it is an equitable lien,* the estate generally.

The Court are rather inclined to consider it an equitable lien on Dr. Polony's estate than a trust, because it does not appear on the face of the paper that he was intrusted with this sum, to be laid out for her benefit and advantage, as he was with that which he first received on complainant's account; and he has not in this last memorandum fixed on any specific property, as a fund out of which this money is to be paid; therefore it must be paid out of the estate generally."

In *Miller v. Miller,* 148 Mo. 113, the action was an equitable one in partition. The facts are very complicated and the suit was brought, as stated in the opinion, "to adjust the equities of the parties". The deceased there had made an agreement that he would hold one-half of the land in trust for a minor girl and he was to support and educate her until she became of age, with certain other conditions not necessary to state. He did nothing under the contract and after his death the court appointed a trustee directing him to carry out the trust and it was thereafter carried out, only, however, in part. The heirs brought a suit in partition and it was held that they were not entitled to the interest in the land until the obligation of the trust had been performed *and an equitable lien upon the property surcharged for the amount that the court concluded was due the minor child.* In this regard the court said:

"There is no difficulty, such as plaintiff suggests, about the court liquidating the amount rightfully due Ruby for support, education and maintenance, *and at the same time requiring*

the Moses heirs to pay it or charge it as a lien on their share or to sell the property and deduct it from their share of the proceeds. The same principle is observed as in cases of a creditor's bill in equity. If the property had passed into the hands of a third, innocent party, for value and without notice of such a charge on the land, the case would be different, and the lien could not be enforced, and Ruby would be relegated to her remedy of a personal action against the promisor for breach of contract. But in this case the heirs of the promisor are claiming the res, which, ever since the decree in 1883, to which they were parties, was rendered, has had this trust impressed upon it, *which has the same effect as if the lien had been reserved in the deed to Moses.* They have never discharged the requirements of the trust, and hence cannot complain, if the court does for them now what they and their ancestors should have done long ago, as a condition precedent to awarding them any share of the trust estate. Neither can these heirs urge a mismanagement of the trust estate, whereby the net rents, issues and profits were rendered insufficient to support, educate and maintain Ruby, for it was their tortious act which caused the expenditure of over fifty per cent of the gross receipts of the trust estate, and being responsible for the litigation, it does not lie in their mouth to question this expenditure; and the other items of expense in managing the trust estate, were allowed and approved by the judgment of the probate court, and hence are *prima facie* correct under any circumstances."

Concluding in its opinion, after noticing that the expectations of the deceased had not been realized:

"But enough. Words cannot make plainer the equity in this case. It speaks louder than words."

In *Leary v. Corvin,* 106 Am. St. Rep. 543, the opinion was rendered by Chief Justice Cullen of the New York Court of Appeals, concurred in by five other justices. The court considers, first, the question of a resulting trust and held that the general contribution of a sum of money toward the purchase of land is not sufficient to create such a trust, nor can such a trust arise in favor of a daughter who furnishes money to her father to be employed in acquiring premises to be used as a home during life and upon his death to go to such daughter when no particular piece of property was in view when the money was furnished. *But the court did not deny to the complainant any relief,* as will be seen by the following extract from page 548:

> *"It does not follow, however, that the plaintiff is entitled to no relief.* She made her contribution to the purchase of the property on the faith of an agreement with her father which he has violated by failing to secure to her the property upon his death and the relation between the parties was one of trust and confidence. The plaintiff's money having been thus appropriated to the acquisition of the property *she has an equitable lien thereon for its amount,* and as she has been induced to let it remain in the property in reliance upon her father's promise, without receiving any compensation therefor, now that that promise has been violated she is justly entitled to interest from the time of the original payment to her father."

In accordance with this principle, a judgment establishing a lien upon this property was ordered.

In *Orrett v. Corser,* 21 Beav. 52, the plaintiff sued his trustee to make him responsible for a trust fund

which has been wrongfully paid to the plaintiff's father, and in this regard the case is identical with the present one. Now, the plaintiff had, in addition, as one of the next of kin of his father, received two-thirds of his estate and it was held that the father's assets in the hands of the plaintiff were primarily liable to make good two-thirds of the trust fund *in exoneration of the trustee.* In addition, however, the Master of the Rolls ordered a decree that, upon the principle indicated, as two-thirds of the debt had been received by plaintiff at the death of his father as heir, he could not recover to that extent, but he was entitled to the remaining one-third, due from the trustee, with interest.

A very interesting illustration of the principle to which we have adverted is found in the bankruptcy case of *In re McDougall,* 175 Fed. 400. There a bankrupt, while in good credit, pledged his Missouri farm for $10,000 for which debt a life insurance policy was also pledged. He desired to make a new loan for $12,000 and so induced his children, who were the beneficiaries of another policy, to assign the same to him that he might use it as security, agreeing that the farm should be first used to pay the debt, then his own policy, and then the children's policy, only in the event that the other security was insufficient.

Now, in the case now before the court the trust deed expressly provides that only in the event that the assets of the Washington-Alaska Bank are insufficient to pay the claims of the creditors shall any resort be made to Mrs. Barnette's property. Upon this set of facts, the court held that the bank-

rupt held the children's policy in trust to pledge the same only in accordanc with the agreement and when it appeared, as it did, that the proceeds of this policy were paid to pay the debt before the proceeds of the farm, a decree was rendered that the children were entitled to have the trust transferred to the proceeds of the farm and to reimbursement therefrom. After citing certain decisions of the Supreme Court of the United States on the point that equity considers things directed or agreed to be done as having been done, the court said:

> "There is another equitable ground on which the *proceeds of this farm* should be held subject *to a trust or lien* for the benefit of the claimants. The proof is undisputed that from the proceeds of the $12,000 loan, represented by two notes of the bankrupt and secured as hereinbefore stated, *the mortgage on this farm was paid* and the satisfaction taken and held by Mr. Cooper, as stated; the now bankrupt remaining in ignorance of that fact for two or more years. The policy in question was used as first collateral for the loan, when, under the agreement, a mortgage on the farm should have been. That loan having been used to clear the farm from incumbrance, and the policy of the children having been used to secure and then pay the loan, so far as so used, *the farm or its proceeds, in equity and good conscience, ought to go to the claimants.* In effect they became surety for the bankrupt on his notes given for a loan which was used to discharge the lien on the farm. The farm, as between the bankrupt and the claimants was to be and in equity was primarily liable for the $12,000. *The property of the children having been used to pay such loan, to the exoneration of the farm, it ought to be held primarily liable for the debt, and followed as the primary fund for its payment in favor of the claimants as*

between them and the general creditors of the bankrupt or his trustee in bankruptcy. Story Eq. Jur. (11th Ed.), p. 556, § 1248.

The violation of the agreement by the bankrupt operated as a fraud upon the rights of the claimants as much as though one had been intended. The bankrupt held the policy for the special purpose, and when it was diverted or misapplied a trust resulted. *If not, then a lien was created on the farm, which was primarily liable under the agreement.* Moore v. Williams, 62 Hun. 55, 16 N. Y. Supp. 403; Leary v. Corwin, 191 N. Y. 222, 73 N. E. 984, 106 Am. St. Rep. 542."

It will be observed that the court cites the case of *Leary v. Corvin,* to which we have referred, and then the court proceeds again:

"From every standpoint it seems clear that in equity these claimants have a lien on the proceeds of the farm. No wrong is done to any other creditor. The doctrine of subrogation is that if A. is liable to B, for the debt of C., as surety for C., and is compelled to pay, he is entitled to stand in the shoes of B. and to any security by way of pledge or collateral which B. holds for the debt. Kolb v. National Surety Co., 176 N. Y. 233, 237, 68 N. E. 247; Cheesebrough v. Millard, 1 Johns. Ch. (N. Y.) 412, 7 Am. Dec. 494. Here B. did not hold the mortgage, but A. supposed he did, and C. had promised he should, and represented that he did. It was cancelled with the proceeds of the loan creating the debt of C., for which A. became surety. The farm, or its proceeds, exists and is in court, subject to no other equities. *Can there be a plainer case of equitable right to a lien on such farm, or its proceeds, aside from a duly executed written instrument?"*

For an illustration of the doctrine of implied liens upon this general principle see Section 1248, 2 *Story's Equity Jurisprudence,* 13th Ed.

Finally, in effect, we think this case in principle is disposed of by the leading case of the United States, *National Bank v. Insurance Company,* 104 U. S. 54, from which we have already quoted. When the facts in *that* case are before the court the importance of the quotation which we have already given will be more apparent and its applicability to the present case becomes clearer.

There A. H. Dillon, Jr., had an account with the bank entitled, "Dr. Central National Bank in account with A. H. Dillon, Jr., gen'l ag't, Cr." In this account he deposited from time to time premiums collected for an insurance company and remitted to it from time to time. Dillon was also indebted to the bank named in quite a sum of money and a note given by him for that indebtedness became overdue and was unpaid. By direction of the bank the note was charged to Dillon in his account *as general agent,* while in ignorance of that fact, as general agent, he continued to make deposits in that account and drew checks upon it, when on June 12, 1874, it was closed. At the time of the closing, *if the bank had not charged Dillon's indebtedness against that fund,* it would have shown a credit balance of $11,000.86 and it was only because the bank had directed its cashier to charge the note against the general agent account that there was no money in that account. The insurance company filed a suit in equity to recover the $11,000.86, "claiming it to be a fund, received by him in his fiduciary

character, as its agent, which they had a right to follow and reclaim as against the bank." *It will be observed that this fund had ceased to exist, and had, in face, actually been paid out.* Nevertheless, the conclusion of the trial court, that the insurance company was entitled to recover this amount, thus paid out, technically non-existent as a trust fund, was sustained by the Supreme Court of the United States. Though described as such a trust fund it was, nevertheless, ordered paid out of the assets of the bank, *for as a specific trust fund it had ceased to be.*

These cases, therefore, we think, fully warrant the decree we ask for. The amount of the trust fund is definitely ascertained as $56,801.89. Of it $31,000 specifically in actual gold coin is traced to and is on deposit with the defendant bank. The balance, according to the statements of the trustee himself, he is about to pay improperly, or has already paid improperly, to others who are not bona fide purchasers for value. In view of these decisions this should not preclude the court from regarding the trust fund in equity as still intact and surcharging the full amount of it as an equitable lien upon the balance of the moneys in the hands of the defendant bank.

These cases and the present case must carefully be distinguished from another line of cases as follows:

It has frequently been held that where a trust fund *before* insolvency, has been depleted by the trustee through payment made to his general creditors, that *unless the specific trust fund can be identically followed after the debtor becomes insolvent,* then the

assignee or trustee in insolvency cannot be required at the expense of the estate to make good the trust fund *out of the estate.*

But the facts here and the facts in the mentioned cases are entirely different. Here at the time of the insolvency of the Washington-Alaska Bank the court, in law at least, *knew the full extent of its assets and its liabilities.* The receiver took title to all the bank's assets and became obligated to pay ratably all the bank's debts. He acquired no title to Mrs. Barnette's property or any interest therein *because such property was not, at the time of his appointment, a part of the bank's assets.* Whatever title he acquired he acquired subsequent to his appointment as receiver, and even then he did not acquire a full and complete title to the property, assuming the deed to have been valid. Under the terms of the trust deed itself conveying this prperty it was his duty to keep separate accounts and only to pay these moneys to the general creditors of the bank in the event that the assets of the bank were not sufficient to pay in full. The trust fund, therefore, arose *subsequent* and not prior to the insolvency, and it was in law, as well as by agreement, a separate and distinct matter.

Under these circumstances, therefore, there is no difficulty, it seems to us, in decreeing that where a large portion of the Mrs. Barnette's moneys have been improperly paid by the trustee to the general creditors, who are not entitled to them, that she is not alone entitled to the amount of the trust moneys that she has identified in specie in the defendant bank, but, in addition, in surcharging an equitable lien to

the extent of the moneys thus paid out, belonging to complainant, upon the balance of all moneys held by the trustee. This result is fortified by the fact that the trustee's own accounting shows the full extent of the trust moneys belonging to complainant, that he has unlawfully paid them out to persons not entitled thereto, that he has the equivalent of these unlawfully diverted moneys in his hand, which is thus sought to be surcharged with an equitable lien. And by so doing none of the persons who have received such prior payment will, if the decree we ask is rendered, lose one dollar of the moneys that they are legally or morally entitled to.

III.

SHOULD EITHER OF THE FOREGOING PROPOSITIONS NOT BE WELL TAKEN, THEN WE ARE ENTITLED TO A JUDGMENT FOR THE FULL AMOUNT COLLECTED BY THE TRUSTEE AND THE RECEIVER, TO BE COLLECTED, THAT PART WHICH IS COMPOSED OF THE SPECIFIC TRUST FUNDS, $31,000, OUT OF THE DEFENDANT BANK, AND THE REMAINDER TO BE COLLECTED IN ANY WAY AUTHORIZED BY LAW.

It is respectfully submitted that the foregoing, as a proposition of law, is self-evident and needs no extended discussion. We, however, offer the following suggestions on the point in the interest of clearness: The trustee of Mrs. Barnette is before the court and he is before the court as receiver of the other trust. *In that capacity* his beneficiaries are bound. He has admitted, under oath, as having $56,801.89 of Mrs. Barnette's money in his possession. If, by reason of the facts aforesaid, Mrs. Barnette is restricted, so

far as trust funds are concerned, to only $31,000 in the hands of the defendant bank, then she is, in addition, certainly entitled to a judgment against the defendant, Noyes, as trustee and individually, and he is sued individually, for the full amount of $56,801.89. In view of the fact that he, himself, sets forth the apparent misappropriation of her moneys, judgment should be against him individually and in view of the further fact that Congress has passed an act permitting him to be sued as receiver, we are entitled to judgment against him as receiver.

Recapitulating, then, this case, it may be viewed in two aspects:

First, its moral aspect; second, its legal aspect.

In its moral aspect the case presents no difficulty whatever. In fact, the nature of the transaction is one which is against public interest. It is very much against public interest for a married woman with two children to beggar herself to transfer her separate property to strangers who are entirely without any shadow of claim to it. Gifts made to persons between whom there is some moral obligation, such as children or parents, are frequently set aside when the slightest imposition has been practised, and *a fortiori,* it is contrary to fundamental principles and a detriment to society to foster a transaction such as the one here.

In its legal aspect the case simply presents the following facts:

The deed executed without consideration was executed because of duress. Until a very long period of time had elapsed and public excitement in Alaska had

quieted, which it had not done until after the acquittal of her husband, Mrs. Barnette was under no obligation to commence any suit anywhere. She did finally commence a suit there in good faith but upon an erroneous theory. When, while this suit was pending, it was ascertained by new counsel that this theory was erroneous and that, in addition, the trustee had transferred her moneys in violation of the deed of trust to this jurisdiction, suit was brought within three months after knowledge of the deposit of the funds here and upon a correct theory. There has been no change in the corpus of the property since the time of the grant; it is still intact; all the trustee has done has been to collect the rents.

This mere statement of the situation seems to preclude the possibility of their being any objection to awarding the complainant the relief asked.

It is therefore respectfully submitted that on the appeal of the defendants the decree should be affirmed and that upon the cross appeal it should be reversed and the amount of the judgment for complainant increased to $56,801.89. (Tr. p. 326.)

Dated, San Francisco,
September 1, 1925.

Wm. H. Chapman,
R. P. Henshall,
Attorneys for Appellant.

APPELLEE'S

BRIEF

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1925

No. 149

ISABELLE BARNETTE,
Appellant,
vs.
WELLS FARGO NEVADA NATIONAL BANK OF SAN FRANCISCO, FRED G. NOYES, individually, and FRED G. NOYES, as receiver, etc.,
Appellees.

BRIEF FOR APPELLEES.

The statement of the facts set forth in appellant's brief unduly emphasizes certain details at the expense of more vital elements in the case, and we therefore feel justified in prefacing our brief with a resumé of the facts, bare of any emotional appeal.

On the 5th of January, 1911, the Washington-Alaska Bank, a Nevada banking corporation carrying

on business at Fairbanks, Alaska, suspended payment and was placed by the United States District Court for the Territory of Alaska, in the hands of receivers. E. T. Barnette, the husband of the appellant, was and had been its president since its incorporation. In the middle of February following, the appellant went from Los Angeles to Seattle, where she met her husband, and the two proceeded to Fairbanks, with the intention of assisting in the liquidation of the bank's affairs, so as to secure to the depositors the full amount of their claims. After their arrival in Fairbanks, appellant and her husband, conformably with the expressed purpose for which they went there, and after most constant consultation over a period of six weeks, with their attorney, Mr. Leroy Tozier, executed a trust deed to one W. A. Schinckel, a depositor of the bank, as trustee for all the depositors, covering certain property claimed by appellant to have been her separate property, together with property belonging to her husband. This trust deed was executed for the benefit of the depositors of the Bank, to secure as far as possible the full amount of their demands against it.

It appears that acceptance of this trust deed was refused by Schinckel for the reason that such acceptance might prejudice criminal prosecution of appellant's husband and operate as a waiver of the civil liability incurred by him.

Subsequently, appellant and her husband executed the trust deed sought to be vacated in this suit, this trust deed running to the then receivers of the Bank

and their successors in office. The receivers, likewise apprehensive that acceptance of the trust deed might possibly prejudice criminal prosecution of appellant's husband, and render him immune from civil liability, refused to accept the trust deed. Thereupon the grantors (appellant and her husband) filed a petition in the District Court for the Territory of Alaska, 4th Judicial District, at Fairbanks, praying for an order directing the receivers to accept the trust deed.

The petition of appellant and her husband recited among other things:

> "That certain legal proceedings are contemplated and about to be commenced against your petitioners in this court, which said legal proceedings would subject the real estate and lands situate in the District of Alaska and belonging to your petitioners to the orders and process of the court, and prevent your petitioners from in any way dealing in, or with, or disposing thereof, and all of which said real estate and lands are mentioned in this petition; and which said legal proceedings would entail great and unnecessary expenses upon your petitioners, and that such legal proceedings relate directly to the connection of the depositors with the said Washington-Alaska Bank, and that your petitioners desire to prevent the commencement of such legal proceedings and the incurring of the said unnecessary and great expense by surrendering all the real estate and lands of the said petitioners *to the said receivers,* their successors or successor, in trust, and your petitioners say that it is the desire and intention of your petitioners, and each of them, that all said depositors in said Washington-Alaska Bank shall be paid in full their respective deposits, together with interest thereon at the rate of 6 per

cent per annum from the 4th day of January, 1911, until paid," etc. etc. (Tr. p. 52.)

"That the said E. T. Barnette and the said Isabelle Barnette, his wife, each desire to *grant* and *convey unto the aforesaid receivers* of the said Washington-Alaska Bank the said real estate and lands to be held in trust by the said receivers, their successors, or successor, as security for payment to the said depositors, of all sums of money which are now due, owing and payable to said depositors, and to that end and for that purpose do herewith *deliver unto this Court* certain trust deeds of the said real estate and lands *to be held by said receivers,* their successors or successor, as security for payment, in full, to the said depositors." (Tr. p. 46.) (Italics ours.)

Quoting further from the said petition (Tr. p. 50):

"And your petitioners and each of them further desire that the rents, issues and profits of the said real estate and lands situate in the said Fairbanks Precinct, *shall be collected by the said receivers,* their successors or successor, and after deducting the reasonable charge for collecting the same and taxes and insurance and other legitimate expenses, shall be paid pro rata to the said depositors at such time and in such manner as *this Honorable Court may hereafter direct.*" (Italics ours.)

The petitioners close their petition with a prayer to the Court for an order to be made as follows:

"* * * *directing the receivers,* their successors or successor, to accept and hold in trust the deeds to the real estate, and lands in this petition described and set forth, for the time and in the manner as above recited." (Tr. p. 52.)

"That said order shall also *direct the said receivers,* their successors or successor, to collect the rents issued (issues) and profits derived from

> the real estate and lands situate in the Fairbanks Precinct, Alaska, and disburse and pay same in keeping with the suggestion and request contained in the above petition." (Tr. p. 53.)

Upon the hearing the Court made an order referring the matter to the receivers (Tr. p. 55), who later reported adversely to the taking of the deed of trust. (Tr. pp. 56, 57 and 58.) Notwithstanding this adverse report, however, the Court thereafter made a further order directing the receivers as follows:

> "ORDERED that you, *as such receivers,* may accept the trust deed so executed by E. T. Barnette and Isabella Barnette, his wife, to certain property owned by them in Alaska and Mexico, and that you take the proper and necessary steps and action, to secure the same and the proceeds and issues therefrom, to the payment of the liabilities of the Washington-Alaska Bank, in connection with your duties as receivers in the above-entitled action."

The deed of trust of the appellant and of her husband as parties of the first part *runs to the receivers* of the Washington-Alaska Bank, as parties of the second part. (Tr. p. 17.)

It also provides that as these receivers are contemplating commencing action, in order to avoid legal difficulties, the parties of the first part grant the property *to the parties "of the second part and their successors in the office of receivers* of said bank." (Tr. p. 90.) The habendum provides that they shall hold the property in trust. (Tr. p. 21.)

The proceeds of the trust *are to be returned to said Court and its receivers,* to be disbursed under the

order of the Court. (Tr. p. 23.) And finally it is provided that the trust deed and the covenants and agreements shall bind the heirs and administrators of the grantors, parties of the first part, and the *successors of the parties of the second part.*

This deed was executed by appellant and her husband and acknowledged before the clerk of the Court and his two deputies as witnesses. The recital in the acknowledgment shows that appellant was examined by the clerk privately and separately from her husband and that she declared "that she executed the trust deeds voluntarily and did not wish to retract."

In conformity with, and obedience to, the order above mentioned the receivers accepted the trust deed and took possession of the property covered thereby in the Territory of Alaska, and from March, 1911, to date, the receivers, and their successors in office, have administered the trust. Part of the proceeds of the properties claimed by the appellant, together with other funds of the receivership, all commingled, appellee receiver F. G. Noyes, placed, in part, in the Wells Fargo Nevada National Bank of San Francisco for safe-keeping, under instructions from the United States District Court for the Territory of Alaska, 4th Division (Tr. p. 115), said Bank being a designated depositary of the United States, the other Fairbanks banking institutions being either of doubtful credit or small capital.

On the 16th day of November, 1914, appellant filed an action in the United States District Court for the Territory of Alaska, 4th Division, to set aside this

deed, upon the same ground as that predicated here, namely: duress, but when the case was called for trial (Tr. Vol. II, p. 497) on or about August 1, 1918, the appellant took a voluntary nonsuit. (Tr. p. 499.) A few days before the dismissal of that suit, on July 24, 1918,—that is, seven years and four months after the delivery of the deed and after the statutes of limitation had run against all criminal and civil actions which might have been instituted against her husband, appellant filed the present suit.

The trial in the Court below resulted in a decree in appellant's favor on grounds and findings of duress, and upon the accounting ordered by the Court she was awarded $31,000.00 and costs. From this decree, defendants below (appellees here) appealed to the Circuit Court of Appeals, and upon that appeal the decree of the District Court was reversed with direction to dismiss the bill.

Appellant now appeals to this Court from the order of the Circuit Court of Appeals reversing the District Court and ordering the bill to be dismissed, and also cross-appeals, seeking to have the judgment of $31,000.00 originally rendered by the District Court, increased to $56,801.89.

The insolvency of the Washington-Alaska Bank has been the subject of considerable litigation instituted for the purpose of recovering assets for the receivership, as well as of defending from attack, assets already in possession. Reference to that litigation has been frequently made both in the trial and appellate Courts; and, with the view to throwing some

light on the present case, we here present the citations of that litigation:

Jesson v. Noyes, 245 Fed. 46-52;
Wood v. Noyes, 245 Fed. 742;
Noyes v. Wood, 247 Fed. 72;
Noyes v. Wood, 247 Fed. 83.

ARGUMENT.

I.

APPELLANT INTENDING TO DECEIVE THE RECEIVERS AND DEPOSITORS, FORCED THEM, BY MEANS OF AN ORDER OF COURT, INTO A CERTAIN POSITION, RATIFIED AND ACQUIESCED IN THEIR ACTS, WAITED UNTIL THEIR RIGHTS AND REMEDIES AGAINST HER HUSBAND BECAME BARRED AND THEN COMMENCED THE INSTANT SUIT. IF SHE EVER HAD ANY CAUSE OF ACTION SHE IS NOW ESTOPPED FROM MAINTAINING IT.

Laches has been defined to be such negligence or omission to assert a right as taken in conjunction with lapse of time and other circumstances causing prejudice to an adverse party, operates as a bar.

It is obvious that appellant's conduct in respect of the deed of trust here involved falls squarely within this definition. She permitted seven years and four months to elapse between the execution of the deed of trust and the commencement of this suit to vacate the same and meanwhile through the dispersion of witnesses and the obscuration of evidence rebuttal testimony, which might have been available to the receiver had the suit been seasonably commenced, is no longer available to him.

This Court will take judicial notice of the many circumstances under which the deed of trust was executed,—Fairbanks at the outposts of civilization; the floating character of its population; its remoteness from the place of trial.

In *Lutjen v. Lutjen,* (N. J. Eq.) 53 Atl. 625, the Court said:

> "Lapse of time alone is deemed by the authorities to be a sufficient ground of estoppel in cases like the present, when the Court cannot feel confident of its ability to ascertain the truth now, as well as it could when the subject for investigation was recent and before the memories of those who had knowledge of the material facts had become faded and weakened by time. To constitute estoppel of this description it is not essential that any loss of testimony through death or otherwise or means of proof or changed relations to the prejudice of the other party should have occurred. But the estoppel arises because the Court cannot, after so great a lapse of time, rely upon the memory of witnesses to reproduce the details that entered into the final execution of the instrument of settlement."

Appellant cannot successfully urge the institution of the action brought in the Alaskan Court in 1914 to counter the defense of laches because the mere institution of a suit does not of itself relieve her from the operation of the rule of laches.

See:

21 *C. J.* 215;

Johnson v. Standard Wiring Co., 148 U. S. 360, at p. 370.

In *Whitney v. Fox,* 166 U. S. 637, this Court said:

> "Equity will sometimes refuse relief where a shorter time than that prescribed by the statute of limitations has elapsed without suit. It ought always to do so, where, as in this case the delay in the assertion of rights is not adequately explained and such circumstances have intervened in the condition of the adverse party as render it unjust to him or to his estate that a court of equity should assist the plaintiff."

It is not to be implied from our citing the foregoing case that appellees concede that the statute of limitations had not run against appellant's cause of action.

Appellant attempts to circumvent the defense of laches by contending:

(1) That the filing of the action in the Alaskan Court in 1914 tolled the statute and brought her within the rule announced in *Bogart v. Southern Pacific,* 250 U. S. 483;

(2) That her cause of action did not arise in California until she obtained knowledge of the deposit of receivership funds in the Appellee Bank.

As to the first contention we submit that the mere bringing of a suit does not relieve a person from the imputation of laches—he must prosecute the same with diligence.

Northrup v. Browne, 204 Fed. 224;
Stuart v. Holland, 179 Fed. 969;
Johnson v. Standard Wiring, 148 U. S. 360.

As to the second, it is sufficient to observe that as a prerequisite to any pecuniary recovery, appellant

was required to vacate the deed of trust and her cause of action in that regard arose as soon as she wes released from the alleged duress. Appellant in her complaint took pains to allege with particularity the time when she learned of the deposit of the receivership funds in the Appellee Bank and to stress the promptness with which she commenced the instant suit, but her complaint is significantly silent as to when she was relieved from the alleged duress.

From the date of the execution of the deed of trust to the filing of the instant suit, appellant was fully informed of the claims of the receivers in respect of the property which she had transferred to him; of the sale of a parcel of the property by the receivers; of the collection by the receiver of rents from the property; and she well knew that the receiver was applying such rents and proceeds to the receivership obligations.

She was during all that time represented in Fairbanks by Robert Lavery, her attorney in fact, and by Leroy Tozier, her attorney at law. In view of this knowledge had by appellant and her failure during such a long period of time to question, much less attack, the conduct of the receiver in so dealing with the property, how can it fairly be contended that she did not acquiesce in all these acts of the receiver with respect thereto. Where, in this case, has appellant exhibited the "rare pertinacity in the pursuit of a remedy" (to quote the language of this Court) which characterized *Bogart v. Southern Pacific,* 250 U. S. 483, upon which she places so much reliance. Can

her silence and inactivity in the face of knowledge that the property now claimed by her was being used by the receiver to pay dividends to the depositors of the insolvent Bank be construed in any way other than that she fully ratified every act of the receiver in so dealing with it?

It may save some time of this Court to give a few excerpts of the testimony in support of our statements respecting appellant's knowledge of what the receiver was doing with the property:

It must be remembered that Mr. Leroy Tozier was the attorney who represented appellant, throughout the transaction culminating in the deed of trust here involved. He drew the petitions to the Court and the deeds; he consulted and advised with Mr. and Mrs. Barnette while they were in Alaska, and after they left Alaska. He appears as the attorney of record in the action which was filed in the Alaska Court on November 16, 1914, and thereafter dismissed on August 1, 1918.

Mr. Tozier says regarding Robert Lavery, the attorney in fact of Mrs. Barnette (Tr. p. 539):

> "Robert Lavery held the power of attorney for Mr. Barnette and the power of attorney for Mrs. Barnette * * *"
>
> "I think Lavery was consulted at the time this Second Avenue place was sold. His approval was obtained. He executed the deed on behalf of the principals."

Fred G. Noyes, the receiver, says (Tr. p. 531):

> "At the time I made the sale of the Second Avenue property I consulted Mr. Tozier and Mr.

Bob Lavery. I talked with Mr. Tozier about selling the property and as I understood the trust deed it was understood that we could sell by agreement prior to the time that the deed became effective. I told Mr. Tozier that they wanted to put up a picture house and there was a good chance to sell it, and it was a very poor piece of property to rent. I talked to Mr. Tozier, and I talked to Mr. Lavery, who was representing the Barnettes, and after a month's negotiations the property was sold. We all thought it was a good sale and that it was the best thing to do. I know that the signature of Mr. Lavery was on the deed as representing those grantors."

The same witness says, on page 530 of the transcript:

"To the best of my recollection the date of the sale of the Second Avenue property was 1913 or 1914."

And again at page 558:

"Mr. Lavery took the furniture that was in the home place referred to in this case; the same Mr. Lavery who is spoken of as holding the power of attorney of Captain Barnette and his wife."

And Mr. Noyes further says:

"I am familiar with the three pieces of property, described in the complaint, in a general way. There is a residence on First Avenue and then there is the Pinska property and the Barnette property, which is practically one piece of property—the Barnette Block. Then there was a piece of property down on Second Avenue. Those are the three pieces of property in the deed as I remember it now." (Tr. p. 527.)

"The Second Avenue property has been sold. $2,500. was realized from the sale. It was hard to say whether that is on deposit in the bank.

The money was collected in and put in the vault, and part of it was sent out here and part of it was left there, and it was mingled with the bank's money and all." (Tr. p. 529.)

"I have been out here on business on several trips. I have been here a year at a time, sometimes three or four months at a time. * * *" (Tr. p. 529.)

"To the best of my recollection the date of the sale of the Second Avenue property was 1913 or 1914. I would not be positive of that. The deed was signed by Bob Lavery and myself as receivers. I signed it as receiver or trustee, I don't remember just which. Mr. Lavery signed under a power of attorney from the Barnettes. I don't know that it said 'Mr. and Mrs. Barnette'. He was representing the Barnettes' interest there." (Tr. p. 530.)

Mr. Leroy Tozier further testified (Tr. p. 454):

"I know that the receivers objected to taking the property to the extent of asking the Court whether they should or should not. Their statement was that they did not like to take it because they could not fix the liability upon Barnette. I think they objected to taking it at all. I didn't know at that time that Barnette was just as liable as the other directors who were sued after a while. I know that the others have been sued since. And they were directors just like Barnette was. I remember at this time that the receivers made that objection that they could not fix the liability; I remember what they did, in asking the Court whether they should, or not, and I think they stated that if they accepted the deed from Captain Barnette it would stop them from pursuing a legal remedy against him."

It is difficult, in view of the testimony in this record to understand how appellant can deny that

part of the property which she claims in her complaint was sold with her consent, and that the proceeds of the said sale together with rents were distributed by the receiver under the order of the Court which she procured. (See Tr. pp. 108, 429, 530, 531, 539, 601, 608, 611.)

And thus the record shows that from the creation of the trust to the filing of her action in Alaska, on November 10, 1914, she was, by virtue of her petition, in Court. She had every opportunity to disclose to the Court that the facts which she had previously sworn to be true were, in fact, untrue. Why did she not do it? Until November 16, 1918, she concurred by and through her attorney in fact, R. Lavery, in the administration of the trust and was consulted when a sale was made. (Tr. pp. 527, 529, 530, 531, 539, 593, 599, 600.) She thus deliberately refrained from doing what equity and good conscience demanded of her with respect to the receivers, and the 1400 depositors of the Bank. On the contrary, she lulled them, by her inactivity, indeed, at times, by her positive cooperation, into the belief that they were secured. She was in a position to know, and accordingly knew (the law will presume), from the accounts filed in Court by the receiver, that the proceeds of her properties were being expended and distributed, and she never objected. She maintains that she was still fearful, but it seems strange that her fear should persist until the filing of the instant suit, notwithstanding the personal security afforded by the laws of an enlightened commonwealth.

Appellant's laches must be computed from the date of the contract which she wishes to have set aside—not to the date of filing her action in Alaska, for the dismissal of that action was, if anything, an evidence of abandonment and ratification—but to the date of the filing of the present action, on July 24, 1918, a period of seven years and four months. The alleged cause of action arose in Alaska in March, 1911. Appellant immediately thereafter left for California. If she had returned to Alaska seven years and four months after it arose, and then filed her action there, her absence from the Territory during that period would not have tolled the statute of limitations. Either by force of the statute or by reason of her laches, her remedy would have been extinguished. Her conduct throughout violates every principle of equity as to the diligence universally required for the rescission of a contract obtained by fraud or duress. In *Barkley v. Hibernia Bank,* 21 Cal. App. 456, the Court held that three years without a sufficient excuse would bar the right to relief. The obvious purpose of appellant was that she wanted to escape from the jurisdiction of the Court whose protection she sought and obtained, but to whose officers she now recognizes no obligation. She fled the locality where the receiver was in a position to rebut her evidence with innumerable witnesses, and commenced her action in a jurisdiction 3,000 miles removed from that where it arose.

We submit that the conduct of appellant whose real and obvious motive in bringing suit in the jurisdiction of the Court below was to maneuver for a posi-

tion to her advantage, and to the detriment of the receiver and depositors, was so flagrant as to bar her remedy, if any she ever had.

Twice did appellant go before the District Court of Alaska with documents executed under oath, setting forth therein matters which she intended that Court to believe and to act upon. The order of the Alaskan Court, based upon appellant's petition, should not, now, be used as an instrument to frustrate the very purposes of the receivership, namely: the collection and conservation of the assets of the Washington-Alaska Bank and the distribution thereof to the creditors of the Bank in accordance with the orders of Court.

The trial Court held that the deed of trust in question was obtained through duress and should be set aside. If duress was practiced upon appellant to obtain the deed of trust, the record shows that by formal instruments under oath she induced the Court to become a participant therein, and were it not for her own conduct in prevailing upon the Court to direct the receivers to accept the deed of trust, there would have been no basis for the present suit. This Court is asked to allow appellant to profit by her own wrong in misleading and imposing upon another Court, and to transform into a very weapon against that Court, the instrument which she used to invoke that Court's protection. We submit that appellant does not come into a Court of equity with clean hands. Not only comity between Courts but the very fundamental principles of equity estop appellant from turn-

ing to account her questionable conduct in relation to the District Court of Alaska, 4th Judicial Division.

U. S. v. Throckmorton, 98 U. S. 61;

Nelson et al. v. Mehan et al., 155 Fed. 1 (C. C. A. 9th C).

There are other grounds of estoppel to deprive appellant of any rights to relief in this action. On grounds of public policy alone, a party should not be heard to say that for the sake of safety she swore to something untrue, in a Court of Justice, instead of resorting to the protection of the law. A party who has sought the assistance of a Court upon grounds which under oath are stated by her to be meritorious, should be estopped to set up thereafter that she had to deceive that Court because it lacked the power to protect her.

We submit that when a party has assumed a certain relation with respect to another, and with respect to property which he formerly owned, and such relation has been confirmed by a Court upon the petition of such party, the latter should be estopped from changing that relation where the other, relying thereupon, has lost valuable rights and expended time, labor and money in the administration of a trust of which such property forms a part. In the instant case, if misrepresentations conceived in Los Angeles, nurtured all the way to Fairbanks, and consummated in the District Court there, are held to be justifiable strategy for the parties and their counsel to adopt, then all judicial orders may be open to attack, and litigation endless.

Another ground of estoppel arises from the following facts: Admittedly there were some 1400 depositors of the Washington-Alaska Bank; W. A. Schinckel, one of them, refused to take a conveyance of the Barnette properties; the receivers likewise refused. In fact, the refusal of the receivers to accept the deed of trust was the refusal of all the depositors whom they represented. It seems clear that what the receiver and depositors actually wanted was to remain free and untrammelled to sue Mr. Barnette and to recover from him, just as they did recover from the other directors, as shown by the cases which eventually reached the Circuit Court of Appeals for the Ninth Circuit, and which we have cited at the beginning of our brief. Appellant and her husband forced the deed of trust upon the receivers through the Court, which appointed them and thus altered the legal remedies of the receivers against her husband, because the former believed, and reasonably so, that the terms of the deed of trust obligated them not to sue the latter prior to November 18, 1914. (See *Jesson v. Noyes,* 245 Fed. 46, at page 53.)

Thus the 1400 depositors of the Bank represented by the receivers were deprived of their right of action and recovery against appellant's husband. It is plain that by her petition and deed, she has been directly instrumental in delaying action, and recovery against her husband, *until the running of the statute has, at this time, made it impossible to proceed against him.* Moreover, if she be held entitled to the cancellation of the deed of trust, the provision therein

whereby appellant's husband guaranteed payment of any deficit due to the depositors of the Bank, will also be annulled, a hardship which will be imposed upon 1400 creditors who were in nowise involved in any duress, but who on the contrary stoutly protested through their receivers against the acceptance of the deed of trust now claimed to have been executed under duress.

Defendant receiver and his predecessors in office have now been conducting and administering the trust for a period of over 14 years, during which time they have paid to the depositors of the Bank, under orders of Court, a large portion of the proceeds of the properties covered by the deed of trust, and all this without objection or protest on the part of Mrs. Barnette or her husband. If the law requires better evidence of the ratification of the deed of trust than their conduct in respect thereto since they executed the same, we are frank to say that we cannot produce it.

In addition to the authorities cited by the Circuit Court of Appeals, we submit the following, in support of our contentions:

Davis v. Wakelee, 156 U. S. 680;
City of Oakland v. Carpenter, 21 Cal. App. 463;
Kleinclaus v. Dutard, 147 Cal. 245;
Seculovich v. Morton, 101 Cal. 673;
Clint v. Eureka, 3 Cal. App. 463;
Barklay v. Hibernia Savings Bank, 21 Cal. App. 456;
Royal v. Goss, 45 So. 231.

We therefore submit that because Mrs. Barnette deliberately failed to disclose to the Court or to the receivers, within a reasonable time after executing the deed of trust, that the alleged duress had been exercised upon her, and failed to commence proceedings for redress, she has been guilty of laches; that because she represented to the Court and receivers and some 1400 depositors, for many years, that she guaranteed payment of moneys due them from the Washington-Alaska Bank, at least to the extent of the value of her alleged separate property conveyed by the deed of trust, she is now estopped from using such misrepresentation, for her benefit and advantage; that because she is now unwilling or unable to restore the receivers and depositors to the legal status which they occupied, in respect of the remedies which they had prior to her petition and to the acceptance of the deed of trust, and that because meanwhile these remedies have been lost by lapse of time, her bill is utterly devoid of equity.

II.

THE EVIDENCE ADDUCED TO PROVE THE ALLEGED DURESS, UNDER WHICH APPELLANT STATES THAT SHE WAS LABORING AT THE TIME SHE EXECUTED THE DEED OF TRUST, IS WHOLLY INSUFFICIENT TO SUPPORT SUCH A CONCLUSION AND PARTICULARLY TO CHARGE THE APPELLEE THEREWITH.

Can this Court, sitting in equity, hold that a contracting party may leave her home, travel thousands of miles with the set purpose of consummating a specific contract, petition a court to have the contract

forced upon another, and several years after her petition has been granted, go to another Court with the object of having the contract directed by the former Court set aside? If such be the rule of equity, there can be no safety in, and no reliance upon, the most solemn contracts.

With this in mind we shall now present excerpts of the evidence which the plaintiff adduced in the Court below to show the alleged duress and follow with the authorities which we deem applicable to the facts.

Aside from the threats to her husband, reported to the appellant by him or by his attorneys, there seem to be only two persons, and they women, with whom Mrs. Barnette came directly in contact and who she claims, did threaten her. They were Mrs. Rapp and Mrs. Smart. It will serve, we submit, to quote the evidence to see how persuasive it may be.

Says Mrs. Barnette:

> "We were eating breakfast in the Pioneer Restaurant, when Mrs. John Rapp, a depositor, came in. She told us that she had said that the only way to bring Mr. Barnette to time, to make him pay the depositors dollar for dollar, or to put up *his* property to secure the depositors, was for someone to go to Los Angeles and kidnap our children, and that that would bring him to time." (Tr. p. 421.)

It should be noted that there was in that no direct threat that Mrs. Rapp intended to kidnap the children 3,000 miles away, and more particularly there is not a word to the effect that someone would kidnap the children if *Mrs. Barnette* failed to put up her property to secure the depositors. Evidently, Mrs.

John Rapp directed her threats, if any she made (which we were unable to rebut at the trial, her whereabouts being unknown), to Mr. Barnette, aiming at his property, not to the property of Mrs. Barnette. We may also suggest that this kidnapping was not pleaded or mentioned in the first Alaska complaint, nor in the second complaint, the allegation being only brought in by amendment during the trial. We may also note that Mr. Barnette is not seeking to have the trust deed set aside.

Now, as to the evidence regarding Mrs. Smart:

> "Q. Just relate the conversation you had with this depositor, Mrs. Smart?
>
> A. She told me that they had a home here in California, and that there was a payment due on it, and she wanted me to give her the money to make this payment; she said that my husband had looted the bank, and that we were living in luxury in Southern California. She said that if *he* did not make good the losses of the bank that a grand jury would indict him." (Tr. p. 422.)

The cases cited, infra, show conclusively that threats of lawful prosecution against Mr. Barnette by a grand jury do not constitute duress against Mrs. Barnette, especially as Mrs. Smart demanded that *he, Barnette,* make good the losses, but did not ask that *she* make good the losses.

Mrs. Barnette further testified (Tr. p. 423) as follows:

> "That women depositors had decided to openly horsewhip Mr. Barnette on the streets, and to tear the clothing from my back and humiliate us in that way."

It will be noted that she does not say that it was Mrs. Smart who told her of such an intention on the part of women depositors. It is merely connected with Mrs. Smart, because she adds later on, referring to Mrs. Smart:

"I never saw the woman again."

But it seems now that the threat of horsewhipping Barnette and of tearing the clothing from Mrs. Barnette's back, did not come from Mrs. Smart at all. The event is related in Mr. Tozier's testimony at page 453 of the transcript, where he relates that one evening when he was in his office with *Mr. Barnette,* a woman called on the 'phone, and although unwilling to give her name, requested Tozier to warn Barnette that the so-called "women committee" had intended meeting Barnette and his wife on the street and horsewhipping him and stripping her hat and shirt waist from her unless something was done in the matter of placing securities behind the affairs of the Bank. This, Mr. Tozier communicated to Mr. Barnette, who evidently informed his wife, and thus we have before us some alleged threats at fourth hand, to wit: from the women's committee to the woman who telephoned, from the latter to Mr. Tozier, from Mr. Tozier to Mr. Barnette and from Mr. Barnette to his wife. This will demonstrate our contention, that the pressure (if any there was), brought to bear upon Mrs. Barnette, was brought by her husband, for, according to the further testimony, which we will now quote, he never omitted once to report to her the alleged threats. Unfortunately, being also unable to

locate him, we have no means of verifying her testimony, which is as follows:

> "I think about a week afterwards he (Mr. Barnette) came home, he had received a letter, it was an anonymous letter, but it was supposed to be from a friend, telling him that if he did not proceed to Alaska immediately, and adjust the matters of the bank, that he would meet with violence at the hands of the depositors." (Tr. p. 417.)

We submit that such a letter, which was not even produced, and was anonymous, is no evidence in this case.

(Tr. p. 418):

> "He (Mr. Barnette) went to Seattle and on his arrival there he heard many rumors afloat that there was a Grand Jury about to be called and and that he was going to be criminally prosecuted for wrecking the bank."

A threat to constitute duress must be of an unlawful arrest, or else of a lawful arrest for an unlawful purpose. In view of the fact that Mr. Barnette was thereafter indicted and convicted, threats of laying the matters before the Grand Jury, always presumed to be acting impartially and according to law, do not constitute duress and rumors are not evidence.

> "We went to the house of Mr. Hamil. He had been spending the winter in Los Angeles, and told us that we might occupy his house while we were up there, as my home was then occupied. After we reached this house, Mr. McGowan and Mr. Tozier both told us that they did not think it was safe for us to stay in that house, because it was on an unlighted street, and in the outskirts of the town, and that the minds of the people were so

inflamed against us that they considered it very unsafe for us to remain in that house. So we went to the Pioneer Hotel where we remained while we were in Fairbanks." (Tr. p. 419.)

"Mr. Barnette told me one evening, as he was coming home after he had a meeting with the depositors, that the street was blocked in front of him, and that * * *. And that they called him vile names, these men did; they were Slavonians, he told me, and he drew his gun. He obtained permission from the United States Marshal to carry a gun, because his friends thought it unsafe for him to go unarmed and so did the Marshal. He told me of this. Then he asked the United States Marshal to appoint a bodyguard for him, which he did. There were two; one I have forgotten the name of, the other was Mr. Percy Charles." (Tr. p. 421.)

We submit that Barnette's report to his wife that some unidentified Slavonians, not shown to be either beneficiaries or depositors of the Bank, called him vile names, out of the presence of the appellant, does not constitute duress against the appellant.

"Mr. Barnette told me that Mr. McGowan told him (Mr. Barnette's attorney) that should we dare leave Fairbanks, that we would be shot, unless the matters at the bank were adjusted before we tried to leave there." (Tr. p. 423.)

Obviously, third-hand hearsay evidence of that kind is not to be considered.

"Mr. Barnette told me that there was a Grand Jury in session, and it was reported that unless he made good to the bank he would be indicted for fraud and embezzlement. He said that he had offered to put up a certain portion of his property, but the depositors were not satisfied with that. They had negotiations which lasted days, and he said that at each meeting many of them

were very surly and unfriendly, while others were pleasant. * * * He said it was not the value of the property at all, that it was our personal safety, that he feared that if we did not put up our property to the depositors they would assassinate both of us. * * *" (Tr. pp. 323, 324, 325.)

"Mr. Barnette told me that if we did not satisfy the demands of the depositors that he and I would be assassinated, if we did not sign our property over to them. He (Mr. Barnette) told me that Mr. Paul Fisher had threatened to shoot him in the Pioneer Hotel if he did not deed over his property and satisfy all the demands of the depositors." (Tr. p. 426.)

All this testimony shows that Mr. Barnette and his attorneys insisted upon making such reports to the appellant as would increase any fear which she may have had. Referring to Mr. Tozier, she says (Tr. p. 426):

"I asked him (Mr. Tozier) what he thought would happen to my husband if I did not sign this property over, and he told me that the condition was a very serious one, that he thought he (Barnette) was in bodily danger, and he thought that we would have to satisfy the demands of the depositors."

"Mr. Barnette told me that there was a Grand Jury then in session and it was reported that unless he made good to the bank he was to be indicted for fraud and embezzlement. * * * There were a great many newspaper threats, and the minds of the people were horribly inflamed over this. It was rumored on all sides that he would be killed unless he made good the loss of this bank, that he had juggled the funds and that he had taken them for his own personal use. They were holding the Grand Jury over his head." (Tr. pp. 431, 432.)

The newspapers were not produced and we do not know their contents but even if they were bitter, a small community losing a million dollars may be pardoned for manifesting resentment, especially as it was the second time that the Bank had failed. As to rumors, they can hardly be considered evidence.

> "While this matter with the depositors, the Depositors Committee in accepting deeds, while that was going on they were demanding money from Mr. Barnette, and demanding that he put up all his property; threats were coming to us right along from everywhere. After that I stayed home." (Tr. p. 433.)

> "We left when the Grand Jury adjourned." (Tr. p. 434.)

The only reasonable and genuine fear entertained by the appellant, revealed by the record, was the salutory fear of the action of a grand jury against E. T. Barnette which did not constitute duress against his wife.

> "It (the petition) did express the truth. We put our property up because we were afraid of our lives. * * * I didn't think very much about what the act was, because I just thought that I was doing what Mr. Barnette asked me to do, and I was doing it for our safety." * * * (Tr. pp. 436, 437.)

> "I went up there with my husband because I was fearful to allow him to go alone, after he wired Mr. Tozier from Seattle and asked him if it was not true that there was a Grand Jury about to be called, and that they were going to bring criminal proceedings against him. Mr. Tozier answered this wire and said that it was true." (Tr. p. 438.)

"I thought that if I were there that the people perhaps would not bring criminal proceedings against him, as it had been reported they had intended to." (Tr. p. 439.)

At page 429 of the transcript Mrs. Barnette testified:

"I knew a woman named Sarene. I do not know her last name. She was an Italian. She was a servant at Fairbanks. I talked with her about the affairs of the bank in my room at Fairbanks. She told me that she did not think that Mr. Barnette or myself would ever leave Fairbanks alive if this bank affair was not settled."

"In reference to the kidnapping of the children this morning, something was said about getting them, planning to have somebody take them in Los Angeles, some depositor who was there."

We submit that no weight should be given to the testimony regarding this servant whose name or identity is unknown, who is not shown to be a beneficiary or depositor, and whose opinion is evidently based on nothing but gossip.

With regard to the kidnapping of her children it is to be noted that in her testimony (Tr. p. 421), appellant states that someone was *"to go to Los Angeles* and kidnap our children," whereas later on (Tr. p. 429) she states that the arrangement was "to have somebody take them in Los Angeles, *some depositor who was there."*

At page 428 of the transcript we find that Mrs. Barnette said:

"I read the deeds when they were presented to me."

And at page 437:

> "No one interfered with my freely and voluntarily executing this instrument. *I know what I was doing.* I didn't think very much what the act was, because I just thought I was doing what Mr. Barnette asked me to do and I was doing it for our safety. I was anxious that the deed was executed because it meant that we would leave Fairbanks and go home. The real reason that I executed this instrument was because he said we were both threatened with death, and I signed it. I signed it to save him from criminal prosecution and from being assassinated."

This testimony shows that if any duress was practiced upon Mrs. Barnette, it was exercised by her husband, Mr. Barnette. It must be so, for the few witnesses we could produce at the distance of 3,000 miles from Fairbanks, testified that they saw no evidence of threats or of danger for the appellant.

Mr. F. G. Noyes, at page 557 of the transcript, stated he never saw either Mr. or Mrs. Barnette with a bodyguard, although he saw them on the street; neither did he see either of them with Percy Charles. Mr. Morton Stevens, an attorney of Fairbanks, never saw any bodyguard with them and never heard of any threats against either of them. (Tr. p. 505.) Mr. Wolcott, the Court Reporter of the District Court, who was in contact with Barnette at all times, never saw or heard of any threats. (Tr. p. 510.) At page 524, Wolcott said that he knew Percy Charles very well and that he never heard of his being appointed as a bodyguard to Barnette. J. M. Jessen in his testimony at page 543 of the transcript, says that during the time Mr. and Mrs. Barnette were there, there was no dem-

onstration of an unfriendly character that he ever saw, and that there were no threats of any kind that he ever heard of; that he knew Percy Charles and did not know that he ever was a bodyguard for Barnette. Miss Blanche Watson says at pages 554-555 of the transcript, that she was with Mrs. Barnette several times during her stay in Fairbanks at that time, and that she did not know of any threats or hostile statements against her; that her state of health and her appearance were the same as they ever had been, and that the only source from which she heard of any threats was through Mr. Tozier, the attorney of the Barnettes.

We do not doubt, however, that there was something weighing on Mr. Barnette's conscience, for it appears from the testimony of John L. Sale, that while the latter was engaged in conversation with Barnette in Seattle, prior to Mr. Barnette's departure for Fairbanks, that:

> "During the course of the conversation we threshed over a good many of the details, and the alleged embezzlements, etc., and he practically admitted to a couple of them and stated that he was going in as his attorneys advised. * * *" (Tr. p. 549.)

Mr. LeRoy Tozier, the attorney for the Barnettes testified:

> "She (Mrs. Barnette) then asked me regarding my opinion as to the safety of her husband and the different threats that she said *her husband had conveyed to her,* and I told her that I considered the situation serious and that it was necessary for them to do something." (Tr. p. 445.)

This witness who drew the petition as attorney for appellant further said:

> "I represented in the petition drawn by me that it was voluntary and for the purpose of paying debts, and to avoid litigation. I won't say that that was not the fact, that they had no desire to pay the debts and that it was not voluntary. I won't say that I knew they had no desire to pay the debts." (Tr. p. 502.)

And when asked their frame of mind when they executed and swore to it Mr. Tozier stated:

> "I won't say that I knew they were acting under duress. but it appeared to me that they were in a frame of mind where they believed they would have to do something." * * * (Tr. p. 501.)

And assuredly the alleged duress did not continue very long for in the summer of the same year, Mr. Barnette returned from Los Angeles to Fairbanks to give attention to some property in which he was interested in that district. (Tr. p. 455.)

We have purposely quoted at some length the testimony designed to support the conclusion of duress. At least, we have quoted the most salient parts, with our comments upon their admissibility. We did this to ascertain if possible, whether or not the fear, upon which, it seems, the finding of duress was based, was under the circumstances, justified. That it was not, we believe is scarcely open to question.

No doubt appellant below has staged up with considerable skill, dramatic surroundings of sickness, shipwreck, and the thousand and one hardships that fall to the lot of the traveler in the land of the mid-

night sun, all well calculated to build up a favorable atmosphere for an equity suit. But when all is said and done, and after eliminating anonymous letters, telephone conversations with unknown persons, servants' gossip, and the opinions of unqualified psychoanalysts, and when the clouds of sympathy which appellant below has spread over the record have been removed, we have only the following facts upon which to rest any duress:

(a) A report that some Slavonians, names and interests unknown, met Mr. and Mrs. Barnette, while they were taking a promenade, and told Mr. Barnette that unless *he* paid them their money, or put up *his* property, *he* would never leave the town of Fairbanks alive. (Tr. p. 427.)

(b) That Mrs. Smart told Mrs. Barnette, or an unknown woman told Mr. Tozier, that the women depositors had decided to openly horsewhip Mr. Barnette on the streets, and to tear the clothing from her back and humiliate them in that way. (Tr. p. 423.)

(c) That Mrs. Rapp said "that she had said that the only way to bring *Mr. Barnette* to time was for someone to go to Los Angeles and kidnap our children——".

(d) The threats of criminal prosecution.

As to the threats implied (a) and (b), it seems to us that the precautions taken by Barnette to secure two deputy marshals for a bodyguard, if it be true (Tr. p. 421), should have been sufficient to restore Mrs. Barnette's peace of mind, if it were at all disturbed.

As to (c), the threat of kidnapping the children two or three thousand miles away, through the agency of "someone", some third person, neither named nor identified as prepared to carry out this criminal design, such menace seems so remote, so impracticable, particularly after the actual warning thereof, that any person of ordinary mentality would pay little attention to it, other than perhaps to report the fact to the ordinary custodians of the peace.

The Court will appreciate that we have to assume all evidence on these points to be true, for the reason that, in the nature of the case, the defendant receiver was not, at the trial in any position to rebut such evidence. He had, at no time, any knowledge of what plaintiff intended to prove, and even had he known, it is very doubtful whether he could have located the persons alluded to or ascertained the names of "some Slavonians" or of the authors of the anonymous letters or of the senders of telephone calls, or of the kidnappers. Had the appellant below brought her action in the jurisdiction where the cause of action arose, the conditions might have been very different. Rebuttal evidence would have been more readily available. While we know of no particular yard-stick by which the length and breadth of a person's mental attitude, as to fear, may be accurately gauged, we venture to say that the suggestion that Mrs. Rapp's gossip, or Mrs. Smart's menaces, carried any weight with Mr. and Mrs. Barnette—their attorneys' opinions to the contrary notwithstanding—is as idle as it is misleading.

We shall not discuss paragraph (d), the threats of criminal prosecution. We submit they do not constitute duress. The following authorities support this contention:

Gregor v. Hyde, 62 Fed. 107 (8th Cir.);
Bodine v. Morgan, 37 N. J. Eq. 426, 431;
Compton v. Bunker Hill Bank, 36 A. Rep. 147;
Thorn v. Pinkham, (Md.) 24 Atl. 718, 30 Am. St. R. 335;
Hilborn v. Buckham, (Me.) 7 Atl. 272, 57 Am. Rep. 816;
Girty v. Standard Oil Co., 37 N. Y. S. 369;
Rendleman v. Rendleman, 41 N. E. 223;
Eddy v. Herrin, 17 Me. 338;
Sanford v. Sorenberger, 41 N. W. 1102;
Phillips v. Henry, 28 Atl. 477;
Landa v. Obert, 45 Tex. 539;
Mundy v. Whitmore, 19 N. W. 694;
Fairbanks v. Snow, 13 N. E. 596;
Rogers v. Adams, 66 Ala. 600;
White v. Graves, 107 Mass. 325;
Green v. Scranage, 19 Ia. 461;
Sheard v. Laird, 15 Ont. App. Rep. 336.

In order that threats of arrest, indictment and imprisonment, or any of them, be sufficient, it must appear that the threats were of an unlawful arrest, or that they were of a lawful arrest for an unlawful purpose. One who has been defrauded has a perfect right to threaten that unless reparation is made, criminal prosecution will be begun. Such a threat does not constitute duress.

Thorn v. Pinkham, 24 Atl. 718, 30 Am. St. Rep. 335, was an action on a promissory note given for a sum of money embezzled. The defendant pleaded duress and the Court stated:

> "It is contended that the note was obtained by duress, and that the consideration was illegal. Suppose that the embezzler had been plainly told that, unless he paid or secured the amount that he had stolen, he would be prosecuted for the theft, and thereupon gave the note. That would not have been duress."

And in *Holborn v. Buckman,* 7 Atl. 272, 57 Am. Rep. 816, the plaintiff had paid money, as he claimed, under a threat of arrest for stealing flour and meal. He sought to recover the money, but the Court said:

> "But suppose such threats had been made—suppose that instead of leaving it to inference, he had been told in so many words that if he did not settle he would be prosecuted both civilly and criminally—still such threats, under the circumstances disclosed in this case, would not constitute duress. It is not duress for one who believes that he has been wronged to threaten the wrongdoer with a civil suit. And if the wrong includes the violation of the criminal law it is not duress to threaten him with a criminal prosecution."

The case of *Girty v. Standard Oil Co.,* 37 N. Y. S. 369, arose out of the following facts. The plaintiff's husband had been in the employ of the Standard Oil Company and had charge of its moneys and books of accounts. The Company charged him with embezzling over a quarter of a million dollars. Plaintiff conveyed a house and lot to the Company to save him from criminal prosecution. Later she brought suit to set aside the conveyance as made under duress, to-wit:

statements made by her husband to her that he would be arrested for embezzlement and would commit suicide unless she executed the conveyance. The Court held that there was no duress and said:

> "When the charge of embezzlement was made against Mr. Girty, while he denied the accusation in words, his conduct was such as to indicate that it was true. But, however great may have been the wife's confidence in his honesty, her evidence shows that she must have realized that a large money claim was made by the Standard Oil Company against her husband on account of his alleged defalcation, and she executed the deed to relieve him from that claim. There is no proof that the claim was not well founded, and the acts of Mr. Girty tended to show that it was. The husband told the wife that he was accused of embezzlement, and wanted her to sign some papers, that if she signed them he would go on with the same salary in the employ of the Standard Oil Company, and nobody would ever know it; that if she did not, he would be arrested, and never could stand that disgrace, but would commit suicide, and she had better commit suicide with him."

This, the Court held, did not amount to duress. The decision is based upon the ground that threats of prosecution made by persons who believed the threatened person guilty do not constitute duress if made for a lawful purpose in good faith. The decision is also based upon the ground that it was not shown that the Standard Oil Company made any threats in the presence of the plaintiff against her husband, or that the Company constituted him its agent to report the threats to her.

So, in the case at bar, the report by Mr. Barnette to Mrs. Barnette of threats against himself made by two

or three creditors of the bank out of 1400 did not constitute duress. In order that they be so considered, the threats must have been made in her presence or he must have been constituted the agent of the creditors to report the threats to her. The other authorities above cited are to the same effect.

These conclusions, then, necessarily follow:

As outside of Mrs. Barnette's statement that her husband, Mr. Barnette, told her that the depositors wanted to have her property included in the deed of trust, there is not a scintilla of evidence that anybody else, directly or indirectly, asked for or wanted that property, it follows that if she included it in the deed it was because of the entreaties and reports of threats of her husband and his attorneys. This being the uncontrovertible fact, it may be that if Barnette unlawfully influenced her she may have some recourse against him, but surely it gives her none against the receiver and the depositors, if by reason of the severance of her marital relationship with Mr. Barnette, she has been thus induced to change her mind.

It is extremely doubtful whether there was any duress practiced or exercised upon Mrs. Barnette. She appeared quite free from duress and evidently self-possessed when she signed and swore to the petition, and when she executed the deed of trust. She gave her consent, no doubt, although we believe that such consent was given with a mental reservation. (See Tozier's testimony, Tr. pp. 500, 434.) In any case it was not a void contract but at most a voidable one, even if there had been duress. But it is clear that no duress was practiced by the receivers, and out of 1400 de-

positors only two of them, namely: Mrs. Smart and Mrs. John Rapp, are mentioned as having had anything whatsoever to do with her and therefore these 1400 beneficiaries and their receivers are not chargeable with any transaction or contract tainted with duress.

III.

ANOTHER GROUND FOR THE DISMISSAL OF THE ACTION IS THE NON-JOINDER OF AN INDISPENSIBLE PARTY, TO-WIT: E. T. BARNETTE, JOINT GRANTOR IN THE DEED.

It appears from the complaint (Tr. p. 2) that E. T. Barnette was then the husband of appellant and president of the Washington-Alaska Bank, and that he still is such president; that said Barnette and appellant executed the deed of trust as joint grantors. (Tr. pp. 17-26.) It further appears from the deed of trust that said Barnette confessed therein his liability to said Bank. True, it also appears in the petition to the Alaska Court (Tr. p. 45) that the properties of appellant and her husband are described separately but the deed does not segregate any of these properties, and on its face the transaction is in the nature of an obligation either by two sureties for the indebtedness of the Bank to the depositors, or else by one debtor, E. T. Barnette, and by a surety,—Mrs. Barnette.

The Fairbanks city property, claimed by Mrs. Barnette in her complaint (Tr. pp. 7-8) and in which she says that her husband never had and has not now any right, title or interest, is the following:

> Lot 4 in Block 17 (referred to in the evidence as the residence or home property). Lot 5 in

> Block 14 (referred to in the evidence as the Barnette Block and Pinska property). Lot 5 in Block 38 (referred to in the evidence as the Seigenger property).

For the better understanding of the Court we may mention that the transcript shows that the so-called Pinska property and the Barnette Block are both on the same lot, namely: Lot 5 in Block 14. There are two buildings; one occupied by one Pinska and the other by the Barnette Building in that block.

At page 429 of the transcript Mrs. Barnette testified as follows:

> "The first piece of property mentioned in the complaint is the home; the second is the Pinska property; the third is the Seigenger property. I have named all three pieces."

Referring to the residence she says at page 431:

> "The property described in the petition as Lot 4, Block 17, is my property; that was my home. There might have been some mistake in the sworn petition stating otherwise. Mr. Barnette deeded that home to me in 1905."

At page 425 of the transcript she says:

> "The home and the Pinska property were my properties, and the Barnette Block in the rear of this property. Mr. Barnette built that block and gave it to me. I was asked through Mr. Barnette and by Mr. Barnette to deed this property over to the bank."

On the other hand, Mr. Walcott testified at page 526 of the record, as follows:

> "Captain Barnette states that the home place in Fairbanks belonged to him. He claimed that as his own."

Mr. LeRoy Tozier (at page 526) says:

> "The home place stood in the name of E. T. Barnette, as I discovered in the record. He told me that the property belonged to Mrs. Barnette."

And at page 538, speaking of the Seigenger property:

> "My impression is that the property belonged to both Captain and Mrs. Barnette, but I am not positive as to that."

In the verified petition, the home place, namely: Lot 4 in Block 17, above referred to, is claimed by Barnette as being his property and, therefore, as the appellant claimed it in her complaint, as also the Seigenger property, it seems to us that on the ground of disputed ownership alone, it was necessary that E. T. Barnette should be present in court to the end that all conflicts may be fully adjudicated as to the ownership of these lots and as to their proceeds.

Referring to Lot 5 in Block 38, the Seigenger property, Mrs. Barnette at one time claims it as her own and then at another time, *in order to escape from the consequence of having ratified* its sale, by executing the deed, disclaims it, so that we do not really know to whom it did or does belong, nor do we know to whom the $2,500.00, the proceeds of the sale thereof, should be credited.

Again, there is no showing that the Pinska property and the Barnette Block, which it is admitted originally belonged to Barnette and which she testifies he built for her, are not community property.

The Barnettes have since been divorced (Tr. p. 416), but there is no evidence in the record in respect of a property settlement between them. By the decree entered below, the deed of trust is vacated and set aside in toto. It is true, the property of Mrs. Barnette which she seeks to recover is apparently segregated, but, nevertheless, the whole deed is annulled and vacated, and thereby both parties are released, notwithstanding the deed also provides for the payment by E. T. Barnette to the receiver of any deficiency due to the depositors.

Appellees, both in their motion for judgment and throughout the trial, insisted that E. T. Barnette was an indispensable party and now respectfully urge the point. We submit that non-joinder of E. T. Barnette is not only a mere matter of temporary abatement of the suit, but that such non-joinder is jurisdictional and fatal to the bill.

Tobin v. Walkenshaw, 23 Fed. Cases No. 14,068;
Cal. Code of Civil Procedure, Sec. 389;
McPherson v Parker, 30 Cal. 455;
Mitau v. Roddan, 149 Cal. 1.

IV.

NOT ONLY WAS THE APPELLANT GUILTY OF LACHES BUT SHE EXPRESSLY RATIFIED THE DEED OF TRUST AND ACQUIESCED BY HER CONDUCT IN THE PERFORMANCE OF ITS CONDITIONS BY THE RECEIVER.

Mr. Justice Holmes in deciding *Fairbanks v. Snow,* 13 N. E. 596, said:

"It is well settled that when, as usual, the so-called duress consists only of threats and does not go to the height of such bodily compulsion as turns the ostensible party into a mere machine, the contract is only voidable. Again, the ground upon which a contract is voidable for duress is the same as in the case of fraud and is that, whether it springs from a fear or a belief, the party has been subjected to an improper motive for action. But if duress and fraud are so far alike, there seems to be no sufficient reason why the limits of their operation should be different."

Thus where a deed was executed under duress, and an unreasonable length of time elapsed before steps were taken to set the same aside, applying to the matter the rule applicable to other fraud, the transaction is ratified.

1 *Page on Contracts,* Sec. 269;
Chitty on Contracts, (11th Am. Ed.) 273;
1 *Parsons on Contracts* (1st Ed.) 446;
Bishop on Contracts, Sec. 278;
Addison on Contracts (Morgan's Ed.) 454;
Doolittle v. McCullough, 7 Ohio St. 299;
Lyon v. Waldo, 36 Mich. 345 (per J. J. Cooley and Marston);
Royal v. Goss, 45 So. 231;
Fairbanks v. Snow, 13 N. E. 596;
Guinn v. Sumpter Valley Ry., 127 Pac. 987;
Eberstein v. Willets, 24 N. E. 967;
Myers v. Gray, 122 N. Y. S. 1079;
Gregor v. Hyde, 62 Fed. 107;
Bodine v. Morgan, 37 N. J. Eq., 426-431;
Oregon Pacific Ry. Co. v. Forrest, 28 N. E. 137.

In *Guinn v. Sumpter Valley Ry. Co.* (supra) Judge Bean said:

> "The person subjected to duress may see fit to ratify the transaction, and may do so after having become competent to contract. Thus a deed given under duress may be ratified, as by quitclaim, or by acquiescence for an unreasonable time after an opportunity to avoid the contract."

And further:

> "We think the transaction was ratified by Mrs. Guinn by the execution of the quitclaim deed August 29, 1907, and the delay in disaffirming the conveyance for nearly three years."

In *Lyon v. Waldo,* supra, Judge Cooley said:

> "Duress is a good defense, if it is made in good faith and seasonably, but the misuse of legal process to obtain securities is to be regarded as a species of fraud. And where a party relies upon it in equity as ground for avoiding a security, he ought, as in other cases of fraud, to move promptly, and not sleep upon his rights. If he goes on and assumes by his conduct the contract to be in force until the position of the other party in respect to it has changed, he ought to be held to have affirmed it."

In *Eberstein v. Willets,* supra, the Court held a delay of three years ratified the deed alleged to have been obtained by duress, and said:

> "We think the delay in bringing the suit inexcusable, and such as to preclude a decree cancelling the deed."

In *Bodine v. Morgan,* supra, the Court said of one who set up the defense of duress when sued on a note and mortgage:

"He took no steps to set it aside, and never even protested against it, though it had stood against his property for about four years, and consequently had been due for a year when his suit was brought. The complainant is entitled to a decree."

Judge Earl, one of New York's most eminent chancellors, said in *Oregon Pacific R. R. Company v. Forrest,* supra:

"The facts constituting the duress were immediately known to the plaintiff and it was its duty to act promptly in repudiating the agreement which it had been induced to enter into by duress. Instead of doing so it never repudiated the agreement until it commenced this action, more than six years after the agreement of August 13th had been entered into. When this action was commenced it was too late to claim that they (certain bonds) had been obtained by duress. One entitled to repudiate a contract on the grounds of duress should, like one who attempts to repudiate a contract on the ground of fraud, act promptly."

In *Myers v. Gray,* supra, the Court said:

"Although this mortgage was executed in June, 1905, no steps were ever taken to cancel it because of duress or any other imperfection, and the first claim of any such defense is made four years after execution and after the mortgagee's death. One entitled to repudiate a contract on the ground of duress should, like one who attempts to repudiate a contract on the ground of fraud, act promptly. O. P. R. R. Co. v. Forrest, 128 N. Y. 83; 28 N. E. 137. A deed given under duress may be ratified by acquiescence for an unreasonable time."

Thus we have it that the statute begins to run from the time that the party is released from duress, by reason of the lack of the means for the parties inflicting the duress, to carry their threats into effect.

It is clear that from the moment that Mrs. Barnette left Alaska with her husband to return to her home and children in Los Angeles, to-wit, at the end of March, 1911, according to her testimony, she was out of reach of the Slavonians, of Mrs. Smart, of Mrs. Rapp, and thus absolutely free from duress if there ever had been any.

It will not do for Mrs. Barnette to say that until her husband was discharged from some of the indictments, and convicted under one of the indictments, she was still laboring under fear. We have seen that the law is plain that threats of lawful imprisonment do not constitute duress, and it is equally plain that after he had been convicted, as the record shows, such threats as may have been made were justified.

Seven years and four months elapsed between the execution of the conveyance and the filing of this complaint. This lapse of time is a ratification of the deed. *There are no allegations to excuse failure to bring this suit to rescind, as soon as the alleged duress was removed.*

The appellant by her silence and acquiescence has ratified the conveyance (if there ever had been any duress) and having ratified it, she cannot now maintain a suit to rescind it.

The record shows that in November, 1914, appellant filed in Alaska an action in which she sought

the identical relief afforded her in the instant case, and on August 1, 1918, suffered a voluntary nonsuit. She cannot very well be heard to say that the funds belonging to the receivership, then in San Francisco, were not just as available to her through the Alaska Court, and its receiver, as they would be through the Court below. She was already present, and a party in interest, in the Alaska Court. She was in the original jurisdiction and as we contend, in the Court that had exclusive jurisdiction of the trust funds. The natural inference to be drawn from her dismissal is that she deliberately abandoned her action and acquiesced in and ratified the deed of trust.

But there is yet another clear, uncontrovertible act of ratification to which we have already alluded. In the year 1914 appellant (through her attorney in fact Mr. Robert Lavery, and with the approval of her attorney Mr. Leroy Tozier), and the receiver, executed a deed covering one of the parcels of land included in the deed of trust. This parcel, located in Second Avenue, in the Town of Fairbanks, and known as the Seigenger property, was sold for $2,500.00 and agreeably to all parties to the transaction the receiver took possession of the proceeds of the sale and deposited them in the receivership account which was drawn upon for the general purposes of the receivership under orders of the Alaskan Court.

We can readily understand the embarrassment of the appellant to explain to the Alaskan Court so many changes of front. Hence the change of jurisdiction and forum.

V.

THE SUIT SHOULD HAVE BEEN DISMISSED ON THE FURTHER GROUND, TO-WIT:

(A) BECAUSE NO LEAVE TO SUE THE RECEIVER NOYES HAD BEEN OBTAINED FROM THE ALASKA COURT WHICH HAD APPOINTED HIM;

(B) BECAUSE THE "RES" WAS UNDER THE EXCLUSIVE JURISDICTION OR CONTROL OF THAT COURT.

Appellant relied upon a rather ingenious theory in the trial Court. She maintained that the instruments creating the trust should be construed so as to give the receivers in this cause a dual but distinct and separate personality, one of which was that of receivers of the Washington-Alaska Bank, and the other that of trustees for appellant and her husband.

She urged that because her first counsel in Alaska mistakenly sued Noyes as receiver, instead of suing him as trustee, this being an error of counsel, in the pursuit of a remedy, her laches should be excused. The present suit, she maintained, being against Noyes as a mere trustee, no leave to sue was necessary to attack the ownership and recover the possession of the estate. It was further argued by appellant that even if Noyes had held these funds as receiver, instead of as trustee, he could also be sued without leave, for the reason that the transaction involving the creation of that trust was one of the "acts and transactions of his in carrying on the business connected with the receivership". The trial Court expressly or impliedly followed appellant's contention and in so doing fell, we submit, into error.

The record clearly shows that the petition of the appellant to the Alaskan Court (Tr. p. 17) was to obtain an order to have the property in question placed under the control of that Court, in the custody of the receivers and of their successors, specifically, but not in the hands of an ordinary trustee,—that the conveyance is to the receivers *to hold it in trust to the uses* provided in the document. (Tr. pp. 17-19 to 26.)

The transcript of all the accounts and subsequent orders of the Alaskan Court shows that immediately upon the Court's thus taking control of the property covered by the deed of trust, and the receivers the custody thereof, it has been uniformly and uninterruptedly administered by the Court through the receivers. Income therefrom was consistently paid into the receivership account, and a special record thereof kept. Payments were made out of it through these receivers to the creditors according to the terms of the deed of trust. Sales of the property were ratified by the Court. The Court directed that part of the funds of the receivership with which the proceeds of a part of the rents from property covered by the deed of trust had been commingled in the usual course of business, be deposited in a bank outside of the Territory of Alaska, there to abide its further orders. All of these proceedings run counter to the theory that the defendant receiver was a trustee of a merely private trust. In fact, appellant, her agent and her attorney, as well as the receiver, and the Alaskan Court itself having jurisdiction of the receivership of the Washington-Alaska Bank, all con-

ceded that the last mentioned Court had jurisdiction of the trust created by the deed sought to be vacated in the instant case. Appellant's conduct with respect to the deed of trust and the property covered thereby can be explained on no other theory.

Notwithstanding that the account of the funds in the Wells Fargo Nevada National Bank was carried in the name of "Noyes Trustee" or "Noyes Receiver", the fact is that the account was opened there under the directions of the Alaskan Court with funds unquestionably belonging to the receivership assets. Interest on this account was credited to the general receivership fund and withdrawals from this account charged in like manner.

The acceptance of the deed of trust by the receiver, whether or not it was tainted with duress perpetrated by parties other than the receivers, and the administration of such a trust by the officers of the Court, under its supervision and directions, is not a tort or a breach of contract to be classed as "an act or transaction of his or theirs", such as to bring him, and so as to bring (in fact) the Alaskan Court, under the exception intended by the provision of Section 66 of the Judicial Code, dispensing a party from obtaining leave to sue the Court's receiver and to interfere with the corpus, or with the possession of the corpus, of the property placed in his custody by the Court.

Having in mind the evidence above mentioned, we will now pass to a consideration of the cases which we believe to be applicable.

In *Lion Bonding and Surety Co. v. Karatz,* 262 U. S. 77, the latest case on the subject, the U. S. Supreme Court, speaking through Mr. Justice Brandeis, said:

> "Where a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. Wabash Railroad v. Adelbert College, 208 U. S. 38, 54, 28 Sup. Ct. 182, 52 L. Ed. 379, compare Oklahoma v. Texas, 258 U. S. 574, 581, 42 Sup. Ct. 406, 66 Law Ed. 771. Possession of the res disables other courts of co-ordinate jurisdiction from exercising any power over it. Farmers Loan and Trust Co. v. Lake St. Elevated R. R. Co., 177 U. S. 51, 61, 20 Sup. Ct. 564, 44 L. Ed. 667. The court which first acquired jurisdiction through possession of the property is vested while it holds possession, with the power to hear and determine all controversies relating thereto. It has the right while continuing to exercise its prior jurisdiction to determine for itself how far it will permit any other court to interfere with such possession and jurisdiction. Palmer v. Texas, 212 U. S. 118, 126, 29 Sup. Ct. 230, 53 Law Ed. 435."

In the face of the evidence adduced it must be admitted that the Alaskan Court took the property into its possession by ordering its receiver to take and hold the custody thereof. Appellant cannot deny that whatever her motives might have been, she made and presented to the Court the petition which set the machinery of that Court in motion. It is evident that the officers of that Court administered the trust for nearly four years without any objection on her part. Obviously, the Alaskan Court has actually had

possession of the corpus from the inception of the trust created in pursuance of the appellant's own act. If this be true, it seems to us that it is immaterial whether the receiver Noyes held the property as a mere trustee, or as a receiver, or as both. The salient point is that he held it as an officer of that Court and by and under its order, and that his possession, wheresoever he held the property, was the possession of the Court which controlled both the receiver and the property.

In *Farmers Loan etc. v. Lake St. Elev. R. R.*, 177 U. S. 59, 44 L. Ed. 70, cited by Mr. Justice Brandeis:

> "The possession of the res vests the Court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts, whose jurisdiction embraces the same subjects and persons. Nor is this rule restricted in its application in cases where property has been actually seized under judicial process before a second suit is instituted in another Court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, *administer trusts,* or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation the Court may be compelled to assume the possession and control of the property to be affected." (Italics ours.)

In *Moran v. Sturges,* 154 U. S. 256, 274, the Supreme Court held squarely that when property had once passed into the possession of a Court, whether

that possession was actual or constructive, it could not be disturbed. To the same effect is *State of Oklahoma v. Texas,* 258 U. S. 574.

In *Cooper v. Reynolds,* 77 U. S. 308, the Court stated that the seizure of property under proper process is the foundation of the Court's jurisdiction.

In re Tyler, 149 U. S. 164-191, the Supreme Court, dealing with a similar situation, i. e., property in the hands of a receiver, said (p. 181):

> "The property in question was in the custody of the circuit court in the cause within the jurisdiction and protected by injunction. The power exercised was the power to protect the property in the custody of the court from invasion and in order to sustain the receiver's application the ordinary grounds of equity interposed were not required to be set forth.
>
> "No rule is better settled than that when a court has appointed a receiver, his possession is the possession of the court for the benefit of the parties to the suit and all concerned, and cannot be disturbed without the leave of the court, and that if any person without leave intentionally interferes with such possession, he necessarily commits a contempt of court and he is liable to punishment therefor (citing cases). Ordinarily the court will not allow its receivers to be sued touching the property in his charge."

And then the Court, considering the legislation giving the right to sue federal receivers without leave, added (p. 182):

> "Neither that, nor the second section which provides that the receiver shall manage the property according to the valid laws of the state in which such property shall be situated, restricts the powers of the circuit courts to preserve prop-

erty in the custody of the law from external attack."

In *Hitz v. Jenks,* 185 U. S. 155, 166, the Supreme Court, citing and following *Wiswall v. Sampson,* 14 Howard 52, said (p. 169):

> "When a receiver has been appointed, his possession is that of the court and any attempt to disturb it without the leave of the court first obtained will be a contempt on the part of the person asking it. And the doctrine that the receiver is not to be disturbed extends even to cases in which he has been appointed expressly *without prejudice to the rights of persons having prior legal or equitable interests,* and the individuals having such prior interests must, if they desire to avail themselves of them, apply to the court either for liberty to bring ejectment or to be examined pro interesse suo and this though their right to the possession is clear." (Italics ours.)

And the Court adds (page 169):

> "We are not aware of any decision of this court modifying the rules laid down in these cases."

In *Cornue v. Ingersoll,* 176 Fed. 194, the Circuit Court of Appeals for the 1st Circuit held:

> "A decree was entered by a circuit court of the United States on a mandate from the Supreme Court, adjudging a lien on a fund in the hands of an ancillary administrator. Complainants, claiming an interest in such fund, during the same term at which the decree was entered, and while it was still under control of the court, instituted suits in a state court, asking that they be adjudged owners of the fund to the exclusion of the complainant in the decree, who as a defendant removed such suits into the Circuit

Court. Held, that such court properly took jurisdiction and dismissed the suits, as in contempt of its decree and an attempt to interfere with its execution. (Syl.)"

At page 198, the Court says:

"It was plainly the purpose to secure a result in another court which would wholly prevent the execution of the decree of the circuit court of the United States. With that purpose, the complainants invoke independent collateral proceedings in another court, through which it is intended to drive a fatal blow at the right established by the decree of the Circuit Court. Indeed, the purpose is made quite plain by the allegations and prayers, which plainly mean, if they prevail, a complete and effective overthrow and nullification of the operative effect of the decree of the Circuit Court in respect to the property right which it assumed, in clear and unmistakable terms, to declare and establish. If such process is possible by way of collateral attack, the inevitable result would be a direct conflict between the two courts, and direct conflict between their final decrees, directed against the same specific property, because the decree of the circuit court assumes to define the status of the property right, and the decree sought in the state court is one which would completely nullify, not only the operativeness, but the express terms, of the decree of the Circuit Court, which was a court of competent jurisdiction, and one which had first assumed control over the subject-matter in controversy."

At page 201 the Court comments upon the very good reasons for the rule that collateral attack, if permitted, would set to naught all judicial decisions, and states that when judicial proceedings have been begun in one Court, it is imperative that that Court proceed exclusively to final determination.

In *Odell v. Batterman Company*, 223 Fed. 292-297, the Circuit Court of Appeals for the 2nd Circuit said:

"Where a court of competent jurisdiction, whether federal or state, takes property into its possession through a receiver appointed by it, the property is thereby withdrawn from the jurisdiction of all other courts. As said by Supreme Court of the United States in Murphy v. John Hofman Company, 211 U. S. 562, 569, 29 Sup. Ct. 154, 156, 53 L. Ed. 327 (1909):

" 'The Court, having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the *title, possession,* or *control* of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property, and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them.'

"All other courts than the one which has the property in its possession are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which had seized it. And in Wabash Railroad Co. v. Adelbert College, 208 U. S. 38, 54, 28 Supp. Ct. 182, 52 L. Ed.. 379 (1908), the Supreme Court declared that for the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear, determine all questions respecting the title, the possession, or control of the property. The court added that in the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship of the nature of the controversy. The principles to which attention has

just been called are of general application, and serve to prevent a conflict over the possession of property which would be *unseemly* and *subversive of justice.* They have been applied by the Supreme Court of the United States impartially, sometimes in favor of the jurisdiction of the courts of the states, and sometimes in favor of the jurisdiction of the courts of the United States.

"So long, therefore, as the premises in controversy continue in the possession of the receivers appointed by the court below, the jurisdiction of that court as concerns the property is exclusive of the courts of the state of New York. Because of its possession of this property through its receivers the court below has ancillary jurisdiction to determine whether the landlord has a right to forfeit the lease, whether there has been a default which justifies the forfeiture, and, if so, authority to direct the receivers to surrender the property. The court, in the exercise of its supervisory control of the receivers, may order them to relinquish possession to the landlord, if the title is incontestably clear as against the receivers. 34 Cyc. 422; Paly v. Jewett, 32 N. J. Eq. 302." (Italics ours.)

To the same effect is *Robinson v. Mutual Life,* 162 Fed. 794.

In *J. I. Case Plow Works v. Finks,* 81 Fed. 529, a case before the Circuit Court of Appeals for the 5th Circuit, the Court held:

"The provisions of the act of August 13, 1888, authorizing the bringing of suits, without leave of court, against receivers appointed by federal courts, in respect to any act or transaction in carrying on the business connected with the property in their charge, does not authorize the bringing of a suit, without leave, against such a

> receiver, to establish a right to the property placed in his custody, adverse to his right thereto. (Syl.)"

Investment Registry v. Chicago was a case before the Circuit Court of Appeals for the 7th Circuit, decided April 9, 1918 (251 Fed. 510), where the Federal District Court being, through its receiver, in possession of the property of the Railroad Company granted leave to a party to sue the receiver and then revoked the permission.

And the Court said:

> "It must be conceded that the District Court was, through its receivers, in complete possession of all the property of the railroad company, and had exclusive jurisdiction of the rest. The prime end to be served is the due and proper conservation of the property in the hands of the court, in order that there may be prompt and proper administration thereof for the benefit of all having any interest therein. If at any stage of the proceedings the court deems it proper and advisable that any demand or question be litigated elsewhere than in the federal court, it can authorize such litigation to be elsewhere instituted. But neither on principle nor authority does it follow that the court granting the leave to sue may not recall it, if before adjudication in such other tribunal the court granting the leave shall consider, either because of facts subsequently arising, or of new light coming to it as to then existing conditions, it would best subserve the due administration of the estate to recall the granted leave."

In *Mississippi Valley v. Railway Steel Co.*, 258 Fed. 346, decision dated April 19, 1919, the Circuit Court of Appeals for the 8th Circuit said:

"Property in the hands of the receiver appointed by court may not be interfered with even to carry out private agreements, contracts or trusts. (Citing U. S. authorities.) Furthermore, a court which is administering property already in its hands through a receivership may properly draw to itself all disputes as to liens and other rights upon or pertaining to such property." (Citing authorities.)

In re Epstein, 156 Fed. 42, the Circuit Court of Appeals for the 8th Circuit held that:

"Possession of property in custodia legis cannot be interfered with without sanction of court under whose control it is."

In *Stewart v. Laberee,* 185 Fed. 474, the Circuit Court of Appeals for the 9th Circuit held that:

"A court may control by its receivership property beyond its territorial jurisdiction, when it has jurisdiction of the parties, * * *." (Numerous citations.)

Comer v. Felton was also a case before the Circuit Court of Appeals of our own circuit (61 Fed. 731). The syllabus reads:

"Property leased by one railroad company to another, and in possession of a receiver of an assignee of the lessee, was claimed by the receiver of the lessor on the ground that the lease had been terminated by notice by the lessor. Held, that the court which appointed both receivers had jurisdiction of a proceeding for determination of the controversy, either by independent bill or by petition." (Syl. 2.)

"The act of Congress of March 3, 1887, permitting suits against receivers, only permits such suits, without leave of the court, 'in respect of any act or transaction of his in carrying on the

business connected with such property.' Defendant, Comer, has been put in possession of the premises involved by a decree of the Circuit Court, and a suit instituted in a court of law, without leave of the court appointing him, was a gross contempt. In re Tyler, 149 U. S. 164, 13 Sup. Ct. 785; Central Trust Co. v. East Tennessee, V. & G. Ry. Co., 59 Fed. 523 (736-7)."

Coming now to cases before the various U. S. District Courts:

"Where a receiver appointed by a Federal Court actually takes possession of the property, the jurisdiction of that court is complete and possession will not be yielded to a receiver subsequently appointed by a state court although the suit in the state court was commenced before that in the Federal Court."

East Tennessee v. Atlanta, 49 Fed. 608.

"The permission given by the third section of the judiciary act of 1887-88 to sue receivers of Federal Courts for acts or transactions of theirs in carrying on the business connected with the property, without leave of the appointing court is not restricted to the courts having jurisdiction of the receiver and the property, or to the Federal Courts generally but extends to any court of competent jurisdiction, and the appointing court has no power to enjoin the bringing of such suits in any other than the Federal Courts." Railway C. v. Johnson, 14 Sup. Ct. 250, followed. (Syl. 1.)"

"Garnishment proceedings are not suits against the receiver for 'any act or transaction of his', within the meaning of the statute, and the appointing court may enjoin the bringing of such proceedings, as well as suits upon causes of action originating before the receivership, and all other suits not arising from some act or transaction of

the receiver in carrying on the business connected with the property in his charge." (Syl. 2.)

Central Trust Co. v. East Tennessee, 59 Fed. 523. Before Taft, Lurton and Barr, J. J.:

"An independent suit to foreclose a mortgage on property in the hands of receivers cannot be maintained, except by leave of court obtained in that cause. Such leave will not be denied arbitrarily, but only for legal unfitness for the purposes when and where sought." (Syl.)

The Court then notes the Act of 1887, and concludes that no interference can be brought with property in the hands of a receiver, except with the leave of the appointing Court, first had and obtained.

American Loan & Trust Co. v. Central Vermont, 84 Fed. 917.

In *Minot v. Mastin,* 95 Fed. 734, a cause before the Appellate Court for the 8th Circuit, it was held that:

"A person who desires to make a receiver of a Federal Court a party to an original bill or action at law relating to property in the custody of the receiver should first obtain leave of the court appointing him, unless the case is clearly one falling within the provisions of 24 Stat. 552, c. 373, Sec. 3, which permits suits of a certain nature to be brought against such receivers without previous leave." (Syl. 1.)

And in *Royal Trust Co. v. Washburn,* 113 Fed. 531:

"Section 3 of Act Aug. 13, 1888 (25 Stat. 436), providing that 'every receiver of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of the

court', does not authorize a state court to entertain an action against a federal receiver to prevent him from carrying out the orders of the court of which he is an officer." (Syl. 4.)

At page 538, the Court comments upon the Act of 1887 and gives its construction thereon coming to the conclusion set forth in the syllabus.

In *Coster v. Parkersburg,* 131 Fed. 115, the Court said:

> "Where a Federal Court has appointed a receiver of a railroad company in proceedings to foreclose an underlying mortgage, a proceeding against such receiver by another railroad to condemn a grade crossing could only be permitted in the court where such receivership was pending, notwithstanding the act of Congress permitting such receivers to be sued without leave of court first obtained, since such act relates only to suits arising out of acts of the receiver in the discharge of his duties in transactions connected with the property in his hands." (Syl.)
>
> "The act of Congress relating to such suits authorizes them to be brought without leave of the court only where the suit so instituted is because of some act or transaction of the receiver in carrying on the business connected with the property in his possession. If a receiver appointed by this court has negligently discharged his duties, and thereby has caused an injury to another, he can be sued therefor in any court of competent jurisdiction: and if he has made a contract as such official, and thereafter refused or neglected to observe the terms of the same, he may be sued concerning it within another jurisdiction, without the permission of this court, for in such instances the suits would be in respect to his act in carrying on the business connected with the property in his custody. In this case

the object of the bill is to foreclose the underlying mortgage of the Parkersburg Branch Railroad Company, dated July 1, 1879. If counsel are right in their contention that in all cases permission to sue the receiver is unnecessary, then the validity of the mortgage, or the claim that it has been satisfied, could be litigated in a suit filed in another court against said receiver, thereby at least greatly embarrassing the complainants in this suit, as also this, the court of original jurisdiction. * * * The practice found by long experience to be productive of the best results to all concerned is to hear and determine all matters and claims relating to the property in the hands of a receiver by petitions filed in the cause in which he was appointed. This rule has been modified by statute, so far as the courts of the United States are concerned, by permitting a receiver appointed by those courts to be sued in another jurisdiction in cases where his act is drawn in question in transactions connected with the property in his hands, arising during the discharge of his duties as such official. In reaching the conclusion I do, I have not overlooked the opinion of the Supreme Court of the United States in the case of Gableman v. Peoria, D. & Evansville Railroad Company, 179 U. S. 335, 21 Sup. Ct. 171, 45 L. Ed. 220. The opinion and judgment in that case had reference to the special facts then presented to the court, from which it clearly appeared that the receiver had been sued in a court other than the one by which he was appointed for alleged negligence in the operation of a railway train, for carelessness in the use of gates at a railway crossing. The Supreme Court by its judgment in that case, intended to hold that a receiver appointed by a Federal Court could be sued in a state court without the permission of the court appointing him, the object of such suit being to condemn and remove from its jurisdiction a portion of the very property that the court appointing such officer

regarding the property he had taken under its control." (117-118.)

In *Buchannon v. Davis,* 135 Fed. 707, the Appellate Court of the 4th Circuit, commenting upon the act of 1887, says:

"This act provides that suits may be brought against receivers in certain instances therein specified without leave of the court. It was clearly the intention of Congress to restrict the cases wherein suits are to be brought without permission of the court to acts and transactions of the receiver in carrying on the business instrusted to his care, and the statute in question cannot be construed to mean that suits may be brought against a receiver to establish any right to the property which may be placed in his custody without the permission of the court. The property being at all times under the control of the court of administration, it would be absurd to permit the institution of suits in another forum to recover such property or diminish its value."

"If the contention of appellant as to the meaning of the statute be correct, such construction would render the court powerless to protect the property placed in its custody for preservation." (p. 710.)

"The property being in the hands of the court for administration, such court is entitled in the first instance to pass upon the question whether the receiver shall part with any portion of it, and as to whether the compensation for the taking of the same is adequate; otherwise the policy of the law in relation to the appointment of the receivers would be defeated."

"The case of *Gableman v. Peoria, Decatur and Evansville R. R. Co.,* 179 U. S. 335, 21 Sup. Ct. 179, is relied on by appellant to sustain the contention that the petitioner is entitled to bring this suit without leave of the Court. That was

a case wherein a party was injured by the failure of the defendant company in the hands of the receiver to properly operate gates at a railroad crossing." (p. 711.)

"It is the law of the federal courts that the court which first takes possession of property cannot be disturbed or interfered with in such possession by any other court." Robinson v. Mutual Life, 162 Fed. 794.

The District Court of Kentucky, after noting the provision of the Judiciary Act of 1887 and 1888 providing for action against receivers without leave of Court, construes the statute and cites numerous authorities in support of the construction, and concludes by saying:

"The proper proceeding to be pursued by any person claiming an interest in any property in the hands of the receiver of the court is to bring the claim to the attention of the court whose receiver has the property in possession, and have the matter there litigated or otherwise to apply for the court's permission to litigate it elsewhere."

Love v. Louisville, 178 Fed. 507, 509, 510.

In *Slade v. Massachusetts Coal and Power Co.,* 188 Fed. 369, the Court held:

"Where a receiver has been appointed for a corporation mortgagor, the mortgagee could not take any steps towards foreclosing the mortgage while the receivership continues, without first obtaining the permission of the court, in which the receivership proceedings are pending."

"Where mortgagees with notice of receivership proceeding against the corporation mortgagor instituted foreclosure proceedings without permission of the court in which the proceedings

were instituted, such proceedings will be enjoined."

In *Central Trust Co. v. Wheeling,* 189 Fed. 82, the Court said, commenting upon the legislation of 1887:

"Prior to the act of March 3rd, 1887, amended by the act of August 13th, 1888, a receiver appointed by this court could not be sued in the state court for any purpose without the consent of this court. The act in question provides (Section 3) that a receiver may be sued *in respect of any transaction of his in carrying on the business,* connected with such property without previous leave of court by which such receiver was appointed."

"The Circuit Court for the District of Kentucky in Central Trust Co. v. Tennessee, V. & G. R. Co., 59 Fed. 523, very clearly limits the application of the act of 1887, amended 1888, to actions against the receiver which grow out of acts and transactions in respect to carrying on the operations of the railroad."

"The act does not affect suits not having their origin in the operation of the railroad by the receiver. Garnishment proceedings are not suits against the receiver for any act or transaction of his, and such claims must be prosecuted in the manner heretofore settled by order in this cause. Such claims filed with the commissioner appointed to hear them can be thus more speedily and economically determined than by the institution of regular suits."

In *Landon v. Public Utilities,* 234 Fed. 152, the Circuit Court for the 8th Circuit said:

"On February 14th, 1913, this court had jurisdiction and complete control of all this property in the original suit to which reference has been

made. The power is conferred and the duties imposed upon every court in equity, which takes into its possession for administration and disposition the property of owners and lien-holders, to exercise any powers it has, to protect that property from depreciation by the wrongful act of any person or party. Hence it was that, when this court originally took jurisdiction of this property in the original suit, it issued its injunction against all persons, requiring that they interfere not with any of this property. Hence it is that under the law, when a court of equity has taken possession of property for such purposes, a circle of segregation is drawn around it, and the ordinary processes of the law cease to reach it. Neither attachment nor execution may seize one iota of the property, but all controversies concerning it, all claims to it, must be adjudicated upon application to the court which holds the dominion of the property for the beneficiaries. * * *

"Now, whenever it appears to the receiver of this court or of any court, which has control or management of property of this character, that there is danger of its destruction or depreciation by the wrongful act of anyone, it is the duty of that receiver to apply to the court in whose hand he is, to protect that property from destruction or interference. And pursuant to that duty, this receiver, whose only power over the Oklahoma and Missouri property is derived from this court, has applied to this court by this dependent bill to exercise its power to prevent the depreciation of the property in his possession."

The decisions of the State Courts have followed the construction and principles of the Federal Court's decisions. In *Morse v. Tackaberry,* 134 S. W. 273, 274 and 275, the Court held:

"Act Cong. Aug. 13, 1888, C. 866, Sec. 3, 25 Stat. 436 (U. S. Comp. St. 1901, p. 582) providing that every receiver appointed by a Federal Court may be sued as to any act or transaction connected with the property in his charge without previous leave of court, only permits suits against Federal Court receivers without leave of court where the cause of action is based on some act or omission pertaining to the receivership and does not apply to suits in the State Court against a Federal Court receiver, primarily to recover land, to remove a cloud on title, and incidentally to recover for the removal of timber therefrom by the receiver and his employees." (Syl.)

"This statute as construed by the courts only modifies the rule prohibiting suits against receivers without leave of court in which the receivership is pending, to the extent of permitting such suits in cases in which the cause of action alleged is based upon some act or omission of the receiver in carrying on the business pertaining to the discharge of his duties as receiver. The cause of action alleged in this suit is primarily one for the recovery of the land and to remove clouds from the title and is not within the purview of the act of Congress above quoted. The amended petition does allege that the Kirby Lumber Company cut and removed timber from plaintiff's land, and seeks to recover against said company and the receivers as damages the value of said timber, but the right to recover such damages is merely incidental to the right to recover title to the land and if we give the broadest intendment to the allegations of the petition and concede that they in effect charge that the Company, acting through and by the receivers, cut and removed the timber, the essential of the cause of action is not changed. The damages sought to be recovered are merely incidental to the alleged rights to recover the land and are wholly depending thereon."

"Receivers cannot be sued without permission of the federal court which appointed them." (Syl. 5.)

"The possession of the receivers is the possession of the court appointing them, and it is held by the Supreme Court of the United States that the receivers are not subject to statutory penalties and the statute cannot be construed to extend to them." U. S. v. Harris, 177 U. S. 305, 20 Sup. Crt. Rep. 609.

"The receivers in this case having been appointed by a Federal Court, it was necessary to obtain the permission of said Court to sue the receivers, and such permission not having been obtained, a recovery against them cannot be had. Morse v. Tackaberry, 134 S. W. 273; Ry. Co. v. Vivian, 180 S. W. 952 (1146)."

International v. Dawson, 193 S. W. 1145.

And thus it may be seen that, by an unbroken line of decisions, in the Federal and State Courts, the original jurisdiction over the corpus, parties and procedure, is invariably to be maintained, and no collateral attack in or interference by a Court of co-ordinate jurisdiction can be countenanced. The conflict would be disastrous.

Indeed a cursory reading of the transcript, especially of that portion consisting of certified copies of records of the District Court for the Territory of Alaska, 4th Judicial Division, shows the confusion incident to the adjudication by two Courts of co-ordinate jurisdiction on the expenses, charges and distribution of the same fund. The Alaskan Court regards the property in controversy in the instant case as still under its exclusive jurisdiction.

The subtle theory of the appellant in trying to invest the receiver Noyes with a dual personality, appears to us, even if she succeeded in so doing, merely to make a distinction without any difference. It matters not whether the Barnette properties were handled as a private trust or in the general receivership, for the reason that, even conceding (arguendo) that a private trust was intended to be created, and that the receivers were to be the trustees of that trust in their private and individual capacity, there is no doubt that the petition and the deed of trust in clear and unequivocal language required the trustees to turn the proceeds of the trust properties into the Receivership Assets. This being so, it seems that all that the individual trustees were required to do was to administer and manage the property and to turn the cash, *as soon as collected,* into the receivership. This is exactly what is provided for in the documents, and this is exactly what was done.

We must, of course, bear in mind that under a plain construction of the language of the documents creating this trust, the Alaskan Court and all the parties, including the trustor, managed and disposed of the property for seven years and four months, distributed part of the proceeds in accordance with their own construction and understanding of the provision set forth in the papers, and this with the acquiescence of appellant therein.

VI.

THERE IS NO RULE OF LAW AND NO EVIDENCE IN THE RECORD TO SUPPORT THE CLAIM OF APPELLANT (AS STATED AT PAGE 113 OF HER BRIEF) THAT THE TRIAL COURT SHOULD HAVE AWARDED HER $56,801.89.

In order to be able to discuss the remainder of the appellant's brief referring to her cross-appeal, we must base our argument, in answer to hers, upon the theory that the decree of the Circuit Court of Appeals will be reversed and the decree of the trial court reinstated in toto.

Appellant claims that because the receiver has paid out some of the moneys of the trust, either to the depositors, as dividends of the receivership, or in payment of the expenses of administration thereof, he has misappropriated her funds, and that therefore not only should the decree of the Circuit Court of Appeals be reversed, but the balance of the moneys now in the bank over and above the amount of the judgment which she claimed to be erroneous (because less than what she was entitled to) should be awarded to her. In other words, she claims that the judgment should have been increased by the Circuit Court of Appeals and should now be increased by this Court, to be made to cover the gross amount collected by the receiver, and that the whole of the moneys now in the appellee-bank should be awarded to her.

It is shown at page 261 of the transcript, that the gross receipts of the properties claimed by the appellant from the creation of the trust to August 25, 1922, amount to $58,301.89. That is practically what the cross-appellant claims. This accounting was pro-

cured from the records of the Alaskan Court by the receiver, under orders of the District Court. The Alaskan Court made certain deductions therefrom for expenses of administration, etc., leaving a net balance from the properties claimed by cross-appellant. That was all that could have been equitably credited to her in any event.

The Alaskan Court had the original jurisdiction of both the res and the persons of the trustors, and still has it. Moreover, appellees contend that it had, and still has, the exclusive jurisdiction thereof. But whether or not this be the fact, in no case could the appellant get credit for more than $12,185.62, for a court of competent jurisdiction has declared that this is the precise amount of the net proceeds of appellant's alleged separate property involved in this suit, and the judgment of that Court stands of record, unmodified. If it is merely an interlocutory order, the remedy of the appellant to have it altered, is by way of petition in the Alaskan Court; if it is a final order, by way of appeal from the Alaskan Court to the proper Appellate Court. But in any event it should or could not have been disregarded, reversed, or modified, by the United States District Court for the Northern District of California.

Appellant speaks of misappropriations of the funds of the trust by the receivers. This is an indirect, ill-disguised attack on the Alaskan Court, for the defendant receiver has never paid out so much as one dollar of the receivership assets in payment of dividends to depositors, expenses of the receivership, or for any other purpose, except upon the written order

of the Court of which he was an officer, as the record fully shows. When the receiver brought certain of the receivership funds to California, it was done pursuant to the directions of the Court, to the end that these funds might be safely preserved for the beneficiaries. Four Alaska banks had failed within the space of two years. Apparently the Alaskan Court relied upon the principle that the funds of a receivership in the hands and custody of its receiver, were within its control, although without its territorial jurisdiction, a principle which we maintain is not open to question.

Should this Court deem it necessary to have us justify the action of the Alaskan Court in ordering these payments to the depositors and a deduction to be made from the gross receipts for the expenses and charges of the trust, we submit that cross-appellant well knew, as did the Court, that her deed of trust which stood for years uncontroverted and unchallenged, and which she made an exhibit to her complaint, contained the following provision (Tr. p. 23):

> "It is therefore understood and agreed between the parties hereto that the parties of the second part may take immediate possession of all the real property above described and improvements and appurtenances thereunto belonging, and thereafter continue to manage, control, lease the same if necessary, and collect and receive the rents, issues and profits thereof, and after deducting reasonable charges for collecting the same and the payment of taxes, assessed thereon, insurance and other legitimate expenses connected with the management of such property, they shall return to the said court and its receivers the net amount of such rents, issues and profits, the same to be

disbursed by the said court through its receivers pro rata to the said depositors and the owners of unpaid drafts heretofore issued by said bank.

And if at any time after the delivery of this Trust Deed the said Trustees and their successors or successor and the said parties of the first part shall deem it more advantageous to sell and dispose of, than to hold and retain, any of the real property, above described. then the same may be sold and conveyed to the purchaser or purchasers by the said Trustees and the proceeds derived from such sale or sales shall by the said Trustees be delivered to the said court or its receivers and be disbursed under the orders of the Court pro rata to the said depositors and owners of unpaid drafts * * *" etc.

Now, then, this deed, even if it had been executed under duress, was not void, but merely voidable, and as no one could foresee that it would be attacked, all the rents, issues and profits of the Barnette trust funds, as well as the proceeds of the sale of the Second Avenue property sold by the receiver with the consent of appellant's attorneys for $2500.00, became receivership assets from the time of their collection, to be disbursed or otherwise disposed of as the Alaskan Court saw fit.

Thus we contend that the appellant could not, in any event, be entitled to more than $12,185.62, because the exclusive jurisdiction of the res and of the accounting is and has been in the Alaskan Court, whose finding of the above balance is of equal force and virtue with the finding of the District Court below. It is obvious that there could have been no wrongful appropriations of moneys by the receiver since his

accounts and conduct of the receivership were subject to the supervision and approval of the Alaskan Court. The orders might be claimed by appellant to have been erroneous, but not tortious, as she assumes, and as the cases cited in her brief tend to infer. If they were erroneous, we maintain that her sole remedy was by appeal from the ruling of the Alaskan Court.

The same reasoning applies to the charge of commingling the funds. It is admitted that the moneys were commingled, and the record shows that they were so commingled by order of the Alaskan Court, acting strictly in conformity with the terms of the deed of trust, contained in the excerpts thereof, quoted above. Moreover, what right had the receiver, or his counsel, to proceed to decide and adjudicate, contrary to the views and orders of the Court whose officers they were? Appellant contends that Noyes was a trustee of a private trust, unconnected with the receivership, and the District Court so concluded. But the Alaskan Court maintains otherwise, and bases its orders on its own construction of the instrument which it was first to construe and approve and which created the trust. These orders were not made for the exigencies of this controversy. They were first made in March, 1911, and were logically continued to the present time. The main purpose of the deed of trust, as the record of it shows, was to avoid litigation. Indeed, it so declares in so many words, and yet appellant brought this suit, and now contends that the receivership should bear the burden.

In *Kirker v. Owings,* 98 Fed. 499, cited by appellant, the United States District Court of West Virginia appointed Kirker receiver of a bankrupt. It was thereafter discovered that some of the assets of the bankrupt were situate in another jurisdiction, to-wit: in Tennessee, and in order to reduce them to possession, Kirker, upon a proper showing, was appointed ancillary receiver by the District Court of Tennessee. By virtue of the powers given him by the latter Court, he reduced the property to possession (some river barges) operated them at a loss, incurred debts in the process, and finally sold them all for fifty dollars (a price inadequate) and without paying the debts incurred in Tennessee, paid the proceeds to the Court of West Virginia. The claimants of the debts addressed themselves to the Tennessee Court by proper proceedings, and obtained a judgment against the receiver individually. The judgment was to the effect that, unless Kirker could obtain the amount from the West Virginia Court, into whose registry he had, in the meantime paid the funds in his possession, (proceeds of the Tennessee property), he pay out of his own funds, the amounts of the debts incurred by him in Tennessee. A mere perusal of the case will demonstrate that it is in no wise parallel with the case at bar. And yet, it is to be noted that the United States District Court for Tennessee took pains to emphasize in its opinion, the principle that, "by reason of the comity due between Courts of equal jurisdiction, all other Courts should yield, in matter of general policy, to the opinion of the Court of original jurisdiction".

All the cases cited by appellant in pages 37 to 42 of her brief are assuredly leading cases on the doctrine of following trust funds. In some of these cases they were wrongfully, in others, unwittingly, commingled; or again, they were substituted. But not one of them has any bearing upon the case at bar. The trustee did not convert, or misappropriate, or commingle, or substitute, *suo proprio motu*. We have already shown that whatever he did was done as an officer of the Alaskan Court, carrying out its orders, lawfully issued to him. Regardless, therefore, of duress or of erroneous orders respecting the expenditure of money or commingling of funds, appellant's remedy, if she ever had any, should have been seasonably sought in the Alaskan Court, and there only.

VII.

THE SECOND LEGAL PROPOSITION OF APPELLANT SET FORTH IN HER BRIEF (PAGE 121) THAT THE BALANCE OF THE MONEYS OF THE ALASKAN RECEIVERSHIP AND COURT BE SUBJECT TO A LIEN IN HER FAVOR TO REIMBURSE HER FOR THE MONEYS HERETOFORE DISBURSED, IS UNTENABLE. NEITHER THE FUNDS IN THE APPELLEE BANK NOR THOSE IN THE HANDS OF THE RECEIVER, WHERESOEVER SITUATED, ARE SUBJECT TO ANY LIEN OR ATTACHMENT, BECAUSE THEY ARE IN CUSTODIA LEGIS.

The contention is very similar to the previous one, and comes under the same principles. It is equally untenable. In the first instance the record shows that the judgment originally obtained in the District Court and now set aside, was greatly in excess of what could, in any event, be due appellant, even

if the decree of duress had been there affirmed; because for four years the proceeds of property now claimed by her, were paid out to depositors, and expenses were incurred, without objection on her part. Indeed, this was done in accordance with her own covenants and conditions (see paragraphs of deed quoted supra), and the contention that either the receivers or depositors should bear the expense of administering her trust, cannot be seriously considered.

It is to be noted that the cases cited by appellant in support of this further contention have again to deal with tortious and unlawful appropriations. As we have shown, there is nothing of this kind involved in the instant case, as the moneys in the defendant bank, over the amount that had been adjudged to the appellant by the Trial Court, must be deemed like other assets of the receivership physically present in Alaska, within the exclusive jurisdiction of the Alaskan Court, the proper and only Court to which she should have addressed herself for the relief now sought. All moneys in the Bank here are, it must be admitted, *in custodia legis,* and no lien can be declared thereupon elsewhere than in the Court in whose custody these moneys are.

The funds or property of a receivership, taken by the receiver in a foreign jurisdiction under proper orders and procedure, cannot be attached (far less liened) by the Courts of that foreign jurisdiction:

Pond v. Cooke, 45 Conn. 126;
Jenkins v. Purcell, 29 All. D. C.;
Chicago Ry. Co. v. Keokuk, 108 Ill. 317;
Somerset Coal Co. v. Diamond etc., 73 Atl. 442;
Cagill v. Woolridge, 35 Am. Rep. 716.

VIII.

THE THIRD ALTERNATIVE PROPOSITION OF LAW ADVANCED IN APPELLANT'S BRIEF (PAGE 134) IS NOT ONLY PROHIBITED BY SECTION 66 OF THE JUDICIAL CODE, BUT IS CONTRARY TO THE MOST ELEMENTARY AND FUNDAMENTAL PRINCIPLES OF EQUITY.

The third alternative proposition advanced in the appellant's brief is that she should get the $31,000.00 originally awarded her below, out of the moneys in the appellee Bank, and the balance of the gross receipts, some $25,000.00 more, from the defendant receiver, either individually or as receiver.

We cannot believe that appellant seriously contends that the Judicial Code authorizes, without leave, an action against a receiver, or against the corpus of the receivership's funds, for acts performed in pursuance of, and in obedience to, and in compliance with, orders of Court. Clearly the administration of this trust was not a transaction in the receiver's individual capacity. On the contrary, the Court compelled the receivers, over their objections (which, at this time, appear to have been well taken) to take this trust. (Tr. pp. 366-372.) All the other transactions with these funds or the property, such as their distribution or transfer to a United States depositary, were likewise performed under orders of the Court.

And the alternative presented that the defendant receiver be penalized in his individual capacity, to the extent of twenty-five thousand dollars, for carrying out these orders, is no less amazing. Had appellee, Noyes, failed adequately to protect the funds of the estate in his custody by placing them in a

financial institution of doubtful standing, or had he failed to defend them against the appellant, or refused to obey the Court's orders, he would have been derelict in his duty, and liable in an action on his bond. And because, during the thirteen years of his receivership, he adhered strictly to his oath of office in complying with orders of the Alaskan Court, he deserves, according to appellant's contention, to be penalized in the sum of $25,000.00. Such a contention merits no consideration in this Court.

We submit that this appeal and the cross-appeal are devoid of any merit and ought to be dismissed and the decree of the Circuit Court of Appeals affirmed.

We may appositely conclude with a citation of the language of this Court in *Hammond v. Hopkins,* 143 U. S. 224, at page 274:

> "In all cases where actual fraud is not made out, but the imputation rests upon conjecture, where the seal of death has closed the lips of those whose character is involved, and lapse of time has impaired the recollection of transactions and obscured their details, the welfare of society demands the rigid enforcement of the rule of diligence. The hour-glass must supply the ravages of the scythe, and those who have slept upon their rights must be remitted to the repose from which they should not have been aroused."

Dated, San Francisco,
January 6, 1926.

F. De Journel,
Sidney M. Ehrman,
Heller, Ehrman, White & McAuliffe,
Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 149.—October Term, 1925.

Isabelle Barnette, Appellant, *vs.* Wells Fargo Nevada National Bank of San Francisco, a corporation, Fred G. Noyes and Fred G. Noyes, as Receiver of the Washington-Alaska Bank, a corporation, Appellee.	Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

[March 15, 1926.]

Mr. Justice Stone delivered the opinion of the Court.

The appellant brought suit in the Superior Court of San Francisco County, California, for the surrender and cancellation of a deed of land and to recover money received by the appellee Noyes, a receiver acting under the appointment of an Alaska Court, and deposited by him with the appellee bank, as rents derived from the land conveyed and as proceeds of the sale of part of it. The conveyance was made by appellant to receivers, predecessors in office of the appellee Noyes, appointed by the District Court for the District of Alaska. Relief was sought on the ground that the conveyance had been procured by duress. The cause was removed to the United States District Court for northern California and trial in that court resulted in a decree for the plaintiff. On appeal to the Circuit Court of Appeals the decree was reversed on the ground that the suit was barred by laches. — Fed. —. The case comes to this court on appeal. Jud. Code, § 241, before Act of February 13, 1925.

The jurisdiction of the District Court was not challenged in the Circuit Court of Appeals; nor is it challenged here. The petition for removal from the state court to the District Court and the motion to remand, made and denied in the latter, are not shown in the record. They were omitted from the transcript made up on appeal to the Circuit Court of Appeals, because the parties had so stipulated under Rule 75 of the Equity Rules then in force (226

U. S. Appendix p. 23) relating to the reduction and preparation of transcripts on appeals in suits in equity. It therefore does not affirmatively appear on what ground the removal to the District Court was sought, allowed and sustained. But an examination of the bill, which is set forth in the record, shows that the purpose of the suit was to recover land and funds then in charge of the receiver of a court in Alaska which was created by laws of Congress, and derived its powers and authority from those laws. Such a suit was removable under § 28 of the Judicial Code as supplemented by the amendment of § 33 by the Act of August 23, 1916, c. 390, 39 Stat. 532. *Matarazzo* v. *Hustis*, 256 Fed. 882, 887-9; see *Texas & Pacific Ry. Co.* v. *Cox*, 145 U. S. 593, 603; *Board of Commissioners* v. *Peirce*, 90 Fed. 764. The alleged right to recover grew out of transactions between the plaintiff and the receivers within the territory of Alaska with reference to land located in Alaska, in all of which the receiver was acting in virtue of authority conferred on them as officers of the Alaska court. *Rouse* v. *Hornsby*, 161 U. S. 588, 590. As all this is apparent from the face of the bill, and as the removal is not challenged here, we think the presumption should be indulged that the removal was rightly taken, and that the District Court had jurisdiction.

We recognize that property in charge of a receiver is in the custody of the court by which he was appointed and under which he is acting, and that as a general rule other courts cannot entertain a suit against the receiver to recover such property, except by leave of the court of his appointment. *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77, 88-89. But the record shows that shortly after this suit was begun, the court in Alaska expressly authorized the receiver to appear in the suit and to make defense and present a counterclaim in it. This was the full equivalent of granting leave to bring the suit. That the order was made shortly after, instead of before the suit was begun, is not material. *Jerome* v. *McCarter*, 94 U. S. 734, 737; *Board of Commissioners* v. *Peirce*, *supra*, 765-6. The plaintiff contended and the District Court held that, even if there had been no such leave, the suit could be maintained under the legislative permission given in § 66 of the Judicial Code; but we need not consider that question.

On January 5, 1911, the District Court for Alaska appointed receivers for the Washington-Alaska Bank, a Nevada banking corporation engaged in business in Fairbanks, Alaska. The

husband of the appellant had been the president, director and manager of the bank from its incorporation. In February, 1911 the appellant, then residing in Los Angeles, California, went with her husband to Fairbanks to assist in the liquidation of the bank's business, its assets and affairs being then in the hands of the receivers. Six weeks later, after consultation with their attorney, appellant and her husband tendered to one of the depositors of the bank as trustee for the unpaid depositors, a deed conveying real estate of the husband and real estate which was the separate property of the appellant, located in Alaska. Acceptance of the deed was refused on the ground that by it criminal prosecution of the husband and enforcement of his civil liability might be prejudiced or waived. Later a similar deed was tendered to the receivers and rejected by them for the same reasons. Appellant and her husband then filed a verified petition in the court in which the receivership was pending, praying that the receivers be directed to accept the trust deed and expressing the desire to prevent the commencement of legal proceedings against them by the receivers and to pay all the depositors of the bank in full. The court made an order authorizing the receivers, as such, to accept the deed and administer the trusts created by it, in connection with their duties as receivers.

The deed was executed by appellant and her husband on March 18, 1911 and was separately acknowledged by appellant, the certificate of acknowledgment stating that she executed it voluntarily and that "she did not wish to retract it." The receivers took possession of the property in Alaska; they and later their successor, the appellee, Noyes, received the rents from it and the proceeds of sale of some of the land, and the fund now in dispute was derived from the administration of the trust.

Within a week after executing the conveyance appellant departed from Alaska with her husband and returned to her residence at Los Angeles. More than three years later, on November 16, 1914, she instituted suit in the Alaska court against the receivers, to set aside the conveyance of her separate property on the ground that it had been procured by duress. The case was not brought to trial and after more than three years, on August 1, 1918, she consented to a non-suit, having in the meantime, on July 24, 1918, commenced the present suit.

The district court below held that appellant's conveyance had been procured by duress. This conclusion was based on findings

that during the period of appellant's sojourn in Alaska in 1911 threats or "suggestions" were made to her (which it appears were made by two women depositors of the bank and by others who are unidentified), that her children would be kidnapped and her husband and herself subjected to personal violence; that under the circumstances these threats aroused in her a reasonable fear for the safety of her children, her husband and herself, and induced the execution of the deed to the receivers.

We turn aside from the objections pressed upon us that the evidence was insufficient to establish duress and that in neither pleading nor proof is it suggested that the receivers or the great majority of the creditors of the bank were parties to or aware of the alleged duress. See *Fairbanks* v. *Snow*, 145 Mass. 153. Nor need we consider any of the numerous defenses interposed, except the acquiescence of appellant in her deed, and her delay in asserting her rights, which, in the circumstances, are decisive of the case.

Appellant's cause of action is necessarily founded upon the assertion of the rightful and effective exercise of the power to disaffirm her conveyance, which arose as soon as she was relieved from the compulsion of the alleged duress. Acts induced by duress such as is here relied on, which operates only on the mind and falls short of actual physical compulsion, are not void in law, but are voidable only, at the election of him whose act was induced by it. *Andrews* v. *Connolly*, 145 Fed. 43, 46; *Miller* v. *Davis*, 52 Colo. 485, 494; *Eberstein* v. *Willetts*, 134 Ill. 101; *Fairbanks* v. *Snow*, *supra*; *Miller* v. *Lumber Co.*, 98 Mich. 163; *Oregon & P. R. R. Co.* v. *Forrest*, 128 N. Y. 83. If there was duress here, appellant, as soon as she was relieved from its operation, was in a position either to disaffirm her conveyance or to allow it to stand undisturbed as the free and formal disposition of her rights. If her choice was to disaffirm, it might have been evidenced by suit timely brought or by any other action disclosing her purpose to those who would be affected.

In that situation she was subject to the requirement of equity that an election to disaffirm and to recall the legal consequences of an act which has operated to alter legal rights by transferring them to others, must be exercised promptly. *Andrews* v. *Connolly* and other cases cited, *supra*, show how this requirement is applied in cases of duress. The principle has a like application where the

right is founded on fraud. *Upton, Assignee* v. *Tribilcock,* 91 U. S. 45, 54, 55; *Wheeler* v. *McNeil,* 101 Fed. 685; *Blank* v. *Aronson,* 187 Fed. 241.

What promptness of action a court may reasonably exact in these circumstances must depend in large measure upon the effect of lapse of time without such disaffirmance, upon those whose rights are sought to be divested. The appellant formed the intention of taking proceedings to set aside her conveyance immediately on her return to Los Angeles, in April, 1911. This intention remained undisclosed for more than three years until she brought suit in the district court of Alaska in November, 1914. There is no evidence that the threats of violence were renewed after she left Alaska, or that they operated to prevent the prompt exercise of her election when she had returned to her home in Los Angeles. Her husband was brought to trial upon criminal charges growing out of his administration of the affairs of the bank, and criminal proceedings were concluded in December, 1912, or in 1913. During the period from April, 1911, until November, 1914, appellant, who was represented in Alaska by counsel and by an attorney in fact, was aware that the receivers, and later the appellee Noyes, none of whom was shown to have had any knowledge of the alleged duress, were engaged in the administration of the trust created by appellant's conveyance, under an order of the court obtained on her petition. During that period, she made no effort to advise the court or the receivers of the alleged duress or of her intention to disaffirm her deed.

By the provisions of the deed, the grantees were given unrestricted power of sale of the property after November, 1914, but it was expressly provided that sales might be made in the meantime by the united action of the grantors and grantees, and the proceeds paid to the grantees under the trust provisions of the deed. Appellant joined with her husband and the appellee receiver in a sale of one of the plots of her separate property, the conveyance being executed in her behalf by her attorney in fact and the proceeds being paid to the appellee in November, 1911. This unexplained delay of more than three years in exercising appellant's asserted right to disaffirm her conveyance, while the appellee and his predecessors were left in ignorance of her intention to assert it, and her affirmative action as well, in recognizing the validity of her deed and the authority of the appellee under it, establish

conclusively her election to allow her conveyance to stand as the unrevoked and effective agency for the disposition of her rights.

The case is not one which requires us to consider the effect of mere delay in bringing suit to enforce a claim of which appellees had notice, with the consequent opportunity to protect themselves, in some measure, from the prejudice which would otherwise result from mere lapse of time, as in *Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 417, and *Southern Pacific Co.* v. *Bogart*, 250 U. S. 483, relied upon by appellant. Nor have we to do with a situation where complainant's silence did not mislead or prejudice the defendants, as in *Northern Pacific Railway Co.* v. *Boyd*, 228 U. S. 482, also relied upon. Here the very existence of the appellant's right depends upon the timely exercise of her election to disaffirm the deed. Delay in its exercise was necessarily prejudicial to her grantees; for they were entitled to and did rely and act upon the authority of her deed, and their defense under the circumstances was necessarily impeded and embarrassed by the lapse of time during the period in which they were left in ignorance of appellant's claim.

The judgment of the Circuit Court of Appeals is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 149.—October Term, 1925.

Isabelle Barnette, Appellant, *vs.* Wells Fargo Nevada National Bank of San Francisco, et al.	Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

[March 15, 1926.]

Mr. Justice Brandeis, with whom Mr. Justice Sanford concurs, dissenting.

In my opinion, the decree of the Circuit Court of Appeals should be reversed with directions to the District Court to remand the case to the state court, or this Court should, in its discretion, order that copies of all papers in the District Court relating to the removal be filed here, so that we may determine whether the lower courts have properly exercised jurisdiction. Compare order issued February 1, 1926, in No. 10, *Whitney* v. *California*, Sup. Ct. Journ. 176.

The determination of the jurisdiction of the courts below is one of the essential functions of this Court. *Cochran* v. *Montgomery County*, 199 U. S. 260, 270. "On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Mansfield, Coldwater & Lake Michigan Ry. Co.* v. *Swan*, 111 U. S. 379, 382; *Chicago, Burlington & Quincy Ry. Co.* v. *Willard*, 220 U. S. 413, 419; *Baltimore & Ohio R. R.* v. *City of Parkersburg*, 268 U. S. 35. The record must show affirmatively "the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments." *Brown* v. *Keene*, 8 Pet. 112, 115; *Hanford* v. *Davies*, 163 U. S. 273, 279. If the jurisdictional facts appear affirmatively somewhere in

the record, the case need not be dismissed merely because the pleadings fail to show them. *Robertson* v. *Cease,* 97 U. S. 646, 648; *Realty Holding Co.* v. *Donaldson,* 268 U. S. 398, 400. Amendment of the pleadings to conform to the facts shown by the record may be allowed either in the lower courts or in this Court. *Norton* v. *Larney,* 266 U. S. 511, 516. The record before this Court, which consists of 742 printed pages and several unprinted documents, includes everything which was before the Court of Appeals, but not the whole record before the District Court. What parts were omitted does not appear. The essential jurisdictional facts are not shown in the pleadings or elsewhere in the record.

The record in this Court shows a bill of complaint to have a conveyance of real estate in Alaska annulled on the ground of duress and to have paid to the plaintiff monies alleged to have been deposited in the Wells Fargo Nevada National Bank of San Francisco by one Noyes, claiming to act as receiver of a Nevada corporation. These funds are alleged to be the proceeds of a part of the real estate. The complaint is entitled "Superior Court of the State of California." The record shows next an answer filed in the federal court for the northern district of the State. All subsequent proceedings prior to the appeal were had in that federal court. From these facts, it may merely be surmised that the suit was begun in the state court and before answer removed to the federal court. But the record does not contain the petition for removal, nor any of the other papers ordinarily incident thereto. There is no reference to a removal in any order or decree, in any opinion, in the evidence, nor in any other paper or clerk's entry. The complaint did not allege the citizenship of the plaintiff. An amendment to the complaint, filed in the federal court two years later, states that the plaintiff has at all times been a citizen of California. The defendants named are the Wells Fargo Bank and one Noyes; the latter being joined both individually and as receiver appointed "not lawfully" by an Alaska court for a Nevada corporation. No allegation discloses the citizenship of Noyes. It does not appear anywhere in the record whether an ancillary receiver of the Nevada corporation was ever appointed in California.

A multitude of questions remain unanswered in this state of the record. Thus, we are left to conjecture whether all the defendants

joined in the petition for removal[1], and if not, by whom removal was sought[2]; on what ground removal was sought, whether that ground was good in law and whether it was substantiated by the facts appearing of record[3]; from what court removal was sought[4]; what action the court and the respective parties took; and whether, indeed, there was a proper petition for removal filed in time.[5] On this record it seems to me that this Court is without jurisdiction and that the lower federal courts were also. *Hegler* v. *Faulkner*, 127 U. S. 482. As stated in *West* v. *Aurora City*, 6 Wall. 139, 142:

"It is equally fatal to the supposed right of removal that the record presents only a fragment of a cause, unintelligible except by reference to other matters not sent up from the State court and through explanations of counsel."

"There are no presumptions in favor of the jurisdiction of the courts of the United States." *Ex parte Smith*, 94 U. S. 455, 456; *Bible Society* v. *Grove*, 101 U. S. 610. We may not assume that there was jurisdiction merely because two lower courts have exercised it, apparently without protest.[6] We may not assume that documents omitted from the appellate record by agreement under Equity Rule 75 showed jurisdiction. The requirement that juris-

[1]Compare Wilson *v.* Oswego Township, 151 U. S. 56; Hanrick *v.* Hanrick, 153 U. S. 192; Chicago, Rock Island & Pacific Ry. Co. *v.* Martin, 178 U. S. 245, 248; Gableman *v.* Peoria, Decatur & Evansville Ry. Co., 179 U. S. 335, 337; Mayor *v.* Independent Steam-Boat Co., 115 U. S. 248; Marrs *v.* Felton, 102 Fed. 775, 779; Yarnell *v.* Felton, 104 Fed. 161, 162; Scott *v.* Choctaw, O. & G. R. Co., 112 Fed. 180; Miller *v.* Le Mars Nat. Bank, 116 Fed. 551, 553; Heffelfinger *v.* Choctaw, O. & G. R. Co., 140 Fed. 75; Consolidated Independent School Dist. *v.* Cross, 7 F. (2d) 491.

[2]Compare Bacon *v.* Rives, 106 U. S. 99; Salem Trust Co. *v.* Manufacturers' Finance Co., 264 U. S. 182, 189; Turk *v.* Illinois Central R. R. Co., 218 Fed. 315.

[3]Compare Woolridge *v.* M'Kenna, 8 Fed. 650, 677-678; Mayer *v.* Denver, T. & Ft. W. R. Co., 41 Fed. 723; Gates Iron Works *v.* Pepper & Co., 98 Fed. 449; Yarnell *v.* Felton, 104 Fed. 161, 163. But see Canal & Claiborne Streets R. R. Co. *v.* Hart, 114 U. S. 654, 660.

[4]Compare Noble *v.* Massachusetts Ben. Ass'n, 48 Fed. 337.

[5]Compare People's Bank *v.* Calhoun, 102 U. S. 256; Manning *v.* Amy, 140 U. S. 137; First Nat. Bank of Parkersburg *v.* Prager, 91 Fed. 689.

[6]It is true that, although no party can by his conduct prevent dismissal by this Court when the absence of jurisdiction is discovered, Parker *v.* Ormsby, 141 U. S. 81, mere irregularity in the removal may be waived where the suit might originally have been brought in the federal court. Baggs *v.* Martin, 179 U. S. 206.

dictional facts be affirmatively shown cannot be dispensed with. Compare *Hudson* v. *Parker*, 156 U. S. 277, 284. We may not indulge in conjecture as to the ground on which jurisdiction was invoked. If we were at liberty to do so, what appears in the fragmentary record before us would preclude our sustaining jurisdiction. Jurisdiction could not be sustained on the ground of diversity of citizenship, because the citizenship of the principal defendant is not disclosed. Jurisdiction could not be sustained under Section 33, Judicial Code, as amended by the Act of August 23, 1916, c. 399, 39 Stat. 532, as a civil suit against "an officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer," compare *Matarazzo* v. *Hustis*, 256 Fed. 882, because there is nothing to show that removal was sought upon this ground, or that the requirements of the statute were complied with, compare *Ex parte Anderson*, 3 Woods 124; *Rothschild* v. *Matthews*, 22 Fed. 6, or that there was "a causal connection between what the officer has done" and his asserted official authority. See *Maryland* v. *Soper*, 269 U. S. —. Jurisdiction could not be sustained on the ground that the proceeding is ancillary, because no receiver of the Alaska bank was appointed in California, nor was its estate being administered there, *Mercantile Trust Co.* v. *Kanawha & Ohio Ry. Co.*, 39 Fed. 337; compare *Greene* v. *Star Cash & Package Co.*, 99 Fed. 656, and the ancillary character of the suit furnishes no ground for removal. *Gilmore* v. *Herrick*, 93 Fed. 525. Compare *Byers* v. *McAuley*, 149 U. S. 608, 618-620; *Shinney* v. *North American Savings & Loan Bldg. Co.*, 97 Fed. 9. Jurisdiction could not be sustained on the ground that the case is one "arising under the . . . laws of the United States", because the mere fact that the defendant Noyes is the reputed receiver of a state corporation appointed by a federal court is not a ground for removal.[7] *Gableman* v. *Peoria, Decatur & Evansville Ry. Co.*,

[7]Following the decision of this Court in Texas & Pacific Ry. Co. *v.* Cox, 145 U. S. 593, which upheld the right of removal from a state court of a suit against a receiver of a federal corporation appointed by a federal court, some lower courts, neglectful of the qualification implicit in the fact of federal incorporation, permitted removal generally in suits against receivers appointed by federal courts. Central Trust Co. *v.* East Tennessee, V. & G. Ry. Co., 59 Fed. 523, 528; Jewett *v.* Whitcomb, 69 Fed. 417; Landers *v.* Felton, 73 Fed. 311; Keihl *v.* City of South Bend, 76 Fed. 921; Lund *v.* Chicago, R. I.

179 U. S. 335. The record shows no other way in which the case arises under the laws of the United States. There is no actual controversy as to any federal matter. Compare *Niles Bement Pond Co.* v. *Iron Moulders' Union Local No. 68*, 254 U. S. 77, 82.

& P. Ry. Co., 78 Fed. 385 (involving, however, a federal corporation); Board of Commissioners *v* Peirce, 90 Fed. 764; Pitkin *v.* Cowen, 91 Fed. 599; Gilmore *v.* Herrick, 93 Fed. 525; Winters *v.* Drake, 102 Fed. 545, 550; Pendleton *v.* Lutz, 78 Miss. 322, 328. Other lower courts, recognizing that limitation and also the distinction with respect to receivers of national banks, Grant *v.* Spokane Nat. Bank, 47 Fed. 673, refused to permit removal in suits against receivers appointed only in exercise of the general equity jurisdiction of federal courts, confident that this Court would upon occasion uphold the limitation. Shearing *v.* Trumbull, 75 Fed. 33; Marrs v. Felton, 102 Fed. 775; Chesapeake, Ohio & S. W. R. R. Co.'s Receivers *v.* Smith, 101 Ky. 707. This Court, after holding in Bausman *v.* Dixon, 173 U. S. 113, 114, that "the mere order of the Circuit Court appointing a receiver did not create a Federal question", held in Gableman *v.* Peoria, Decatur & Evansville Ry. Co., 179 U. S. 133, that no removal could be allowed solely on the ground of the receiver having secured his appointment from a federal court. That case and the limitations it established have since been consistently recognized and followed. Pepper *v.* Rogers, 128 Fed. 987; People of New York *v.* Bleecker St. & F. F. R. Co., 178 Fed. 156; Wrightsville Hardware Co. *v.* Woodenware Mfg. Co., 180 Fed. 586; Dale *v.* Smith, 182 Fed. 360; American Brake & Shoe Foundry Co. *v.* Pere Marquette R. R. Co., 263 Fed. 237; State *v.* Frost, 113 Wis. 623, 647. The principle of the decision, as there stated by the Court, 179 U. S. 338, gives effect to the avowed legislative policy underlying the enactment of the Act of Mar. 3, 1887, c. 373, 24 Stat. 552, as amended and re-enacted in Section 66, Judicial Code.